85-794

Supreme Court, U.S.
FILED
NOV 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. .....

In The
Supreme Court of the United States
October Term, 1985

PREUIT & MAULDIN, a partnership;
and L. F. MAULDIN, individually and as Executor
of estate of Leonard Preuit, deceased;
and PREUIT MAULDIN,

Petitioners,

v.

SAMUEL JONES, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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I

QUESTION PRESENTED

Whether a cause of action filed pursuant to 42 U.S.C. Section 1983, alleging denial of due process of law arising from the attachment of cotton pickers under color of state law, is an action for personal injuries subject to the period of limitation contained in *Alabama Code* Section 6-2-34(1) (1975) or, rather, subject to the limitation provided in *Alabama Code* Section 6-2-39(a)(5) (1975).

II

PARTIES TO THE PROCEEDINGS

The following are all of the parties to proceedings in the Court of Appeals for the Eleventh Circuit:

Samuel Jones, Jr. ..... Plaintiff/Appellant

Edward F. Mauldin,
individually and as Executor of the
Estate of Leonard Preuit, deceased ..... Defendant/Appellee

Preuit Mauldin ..... Defendant/Appellee

Preuit & Mauldin, a partnership ..... Defendant/Appellee

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IV

REFERENCE TO REPORTS OF OPINIONS IN LOWER COURTS

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is reported as *Jones v. Preuit and Mauldin*, 763 F.2d 1250 (11th Cir., 1985). The opinion of the district court is reported as *Jones v. Preuit and Mauldin*, 586 F.Supp. 1563 (N.D. Ala., 1984).

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V

STATEMENT OF JURISDICTION

This petition seeks to bring before the Court for review the decision of the United States Court of Appeals for the Eleventh Circuit, entered on June 21, 1985. A petition for rehearing en banc was filed with the clerk of the Court of Appeals on July 9, 1985, and was denied on August 22, 1985. The jurisdiction of this Court is founded upon 28 U.S.C. Section 1254.

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VI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

* * *

42 *U.S.C.* Section 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

Alabama Code Section 6-2-34 (1975)

The following must be commenced within six years:

(1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery;

(2) Actions for any trespass to real or personal property;

(3) Actions for the detention or conversion or personal property;

(4) Actions founded on promises in writing not under seal;

(5) Actions for the recovery of money upon a loan, upon a stated or liquidated account or for arrears of rent due upon a parol demise;

(6) Actions for the use and occupation of land;

(7) Motions and other actions against the sureties of any sheriff, coroner, constable or any public officer and actions against the sureties of executors, administrators or guardians for any nonfeasance, misfeasance or malfeasance, whatsoever, of their principal, the time to be computed from the act done or omitted by their principal which fixes the liability of the surety;

(8) Motions and other actions against attorneys-at-law for failure to pay over money of their clients or for neglect or omission of duty; and

(9) Actions upon any simple contract or specialty not specifically enumerated in this section.

* * *

Alabama Code Section 6-2-39 (1975)

The following must be commenced within one year:

(1) Actions for malicious prosecution;

(2) Actions for seduction;

(3) Actions qui tam or for a penalty given by statute to the party aggrieved, unless the statute imposing it prescribed a different limitation;

(4) Actions of libel or slander; and

(5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; and

(6) All actions for the recovery of wages, overtime, damages, fees or penalties accruing under laws respecting the payment of wages, overtime, damages, fees and penalties.

(7) All actions commenced to recover damages for injury to the person or property of another wherein a principal or master is sought to be held liable for the act or conduct of his agent, servant or employee under the doctrine of respondent superior.

(8) All actions commenced under section 6-5-411 to recover damages for injury or damage to property of a decedent.

VII

STATEMENT OF THE CASE

On February 24, 1984, the respondent, plaintiff Samuel Jones, Jr., filed this action as an original lawsuit in the United States District Court for the Northern District of Alabama, predicating original federal jurisdiction on the civil rights jurisdiction statute, 28 U.S.C. Section 1343. Plaintiff alleged in his complaint that, on April 8, 1982, the sheriff of Lawrence County, Alabama, seized three of plaintiff's cotton pickers pursuant to three writs of attachment issued under the authority of Alabama's attachment statute, *Alabama Code* Section 35-11-111 (1975).

Plaintiff was given no notice or opportunity to be heard prior to seizure of the machines by the sheriff. The writs of attachment were issued at the instance of the petitioners (defendants in the courts below), who had filed suit against plaintiff in the Circuit Court of Lawrence County, Alabama. In plaintiff's Section 1983 action, he alleged that the prejudgment seizure, undertaken pursuant to the writs of attachment, deprived him of the constitutionally guaranteed right to due process of law in violation of the Fourteenth Amendment.

In response to the plaintiff's complaint, defendants filed a motion to dismiss consistent with FRCP 12(b)(6) on March 12, 1984. Setting forth the principal ground that plaintiff's action was filed more than one year after the wrongful acts alleged, defendants asserted that *Alabama Code* Section 6-2-39(a)(5) (1975) was the controlling statute of limitation.

On June 15, 1984, the district court entered an order and memorandum opinion granting the motion and dismissing plaintiff's complaint on the basis that the action was barred by the one-year statute of limitation provided in *Alabama Code* Section 6-2-39(a)(5) (1975). Plaintiff filed a notice of appeal to the United States Court of Appeals for the Eleventh Circuit on July 11, 1984. On June 21, 1985, the Court of Appeals rendered its decision, reversing the district court's dismissal and remanding for further proceedings. On July 9, 1985, defendants filed a petition for rehearing en banc, which was denied on August 22, 1985. The opinion of the Court of Appeals held that the plaintiff's complaint was not subject to Alabama's one-year statute of limitation. Referring to the Supreme Court's decision in *Wilson v. Garcia*, — U.S. —, 105 S.Ct.

1938, 85 L.Ed. 2d 254 (1985), the Court of Appeals opined that plaintiff's Section 1983 claim was subject to Alabama's six-year statute of limitation, codified at *Alabama Code* Section 6-2-34 (1975). Because the complaint was filed less than two years following the alleged wrongful acts, it was not, therefore, time barred.

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VIII

ARGUMENT

When the Supreme Court affirmed the United States Court of Appeals for the Tenth Circuit in *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985), it accepted the Tenth Circuit's approach to the knotty problem of selecting a state statute of limitation for application to Section 1983 claims. There, the Supreme Court held that, for purposes of borrowing a state statute of limitation, all Section 1983 claims are best characterized as a "tort action for the recovery of damages for personal injuries . . . ."[1] In each state thereafter, federal courts would be required to apply that state's statute of limitation for personal injury actions. Left unstated by the Court was what *type* of "personal injury" action was meant when, as exists in several states, there are two or more statutes of limitations for different types of personal injury actions.

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1. *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 1947, 85 L.Ed.2d 254 (1985).

The Supreme Court's new rule came immediately into play in the decision of the United States Court of Appeals for the Eleventh Circuit in this case. In Alabama, however, the Eleventh Circuit was faced with one statute of limitation for "actions for any trespass to person or liberty, such as false imprisonment or assault and battery; . . ."[2] and a different statute of limitation for "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . . ."[3] Alabama law has repeatedly defined the scope

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2. *Alabama Code* Section 6-2-34(1) (1975).

3. *Alabama Code* Section 6-2-39(a)(5) (1975), repealed by *Acts of Alabama* of 1984, 2nd Exec. Sess., No. 85-39, Section 3, effective January 9, 1985. General negligence personal injury actions, as of January 9, 1985, are governed by a two-year limitation found at *Alabama Code* Section 6-2-38(1) (Cumm. Supp. 1985), which states "(a)ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within two years."

The repeal of Alabama's one-year statute of limitation and its replacement with a two-year statute would not cause any different result than that reached by the district court in this case. If petitioners are correct in their contention that the one-year statute was the proper limitation, the period of limitation would have expired long before the replacement with the two-year statute. In other words, if the one-year statute was the correct statute of limitation, respondent's claim would have become barred in April of 1983, almost two years prior to the modification of the statute.

For at least all Section 1983 claims accruing on or after January 9, 1985, petitioners' position would require application of Alabama's new two-year personal injury limitation. Also, it is at least arguable for all Section 1983 claims accruing before January 9, 1985 and for which the *old* period of limitation had not expired as of the effective

(Continued on following page)

of each statute in such a way that the former applies to direct, trespass injuries and the latter applies to negligent, trespass-on-the-case injuries.[4] Finding assault and battery and false imprisonment to be "paradigmatic" of the types of injuries anticipated by Congress in 1871 when Section 1983 was enacted, the Eleventh Circuit held that this Court had intended the phrase "personal injury actions" to mean actions in trespass, rather than trespass on the case. Hence in this case, Alabama's narrow six-year statute of limitation prevailed over the broader one-year personal injury statute.

The narrow issue presented for review in this petition is whether, for purposes of borrowing a state statute of limitation, Section 1983 claims are best characterized as actions for direct, trespass personal injuries or for simple

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(Continued from previous page)

date of the new period, that the new period of limitation would also apply. In the present case, however, respondent's claim had expired long before the effective date of the new statute.

4. See *Sasser* v. *Dixon*, 290 Ala. 17, 273 So. 2d 182 (1973); *Cochran* v. *Hasty*, 378 So. 2d 1131, (Ala. Civ. App., 1979); *W. T. Ratliff Company* v. *Hensley*, 405 So. 2d 141 (Ala., 1981); *Pennick* v. *City of Florala*, 529 F.2d 1242 (5th Cir., 1976); *Federal Mogul Corp.* v. *Universal Construction Co.*, 376 So. 2d 716 (Ala. Civ. App.), *cert. denied*, 376 So. 2d 726 (Ala., 1979); *Ingram* v. *Steven Robert Corp.*, 419 F. Supp. 461 (S.D. Ala., 1976), *aff'd*, 547 F.2d 1260 (5th Cir., 1977); *Dumas* v. *Town of Mount Vernon*, 612 F.2d 974 (5th Cir., 1980); *Jefferson County* v. *Reach*, 368 So. 2d 250 (Ala., 1978).

negligent personal injuries. Because the "personal injury action" characterization arose in *Wilson v. Garcia,* only the Supreme Court can clarify what *type* of personal injury action was contemplated when that phrase was used in *Wilson.* Petitioners contend here that the reasoning and language used by the Supreme Court in *Wilson* leads one inexorably to interpret the phrase to mean general personal injury actions that both lawyers and laymen understand to be predicated upon negligence. This conclusion is bolstered by the procedural history of the Tenth Circuit cases leading ultimately to the Supreme Court's opinion in *Wilson v. Garcia.* Thus, not only is the Eleventh Circuit's opinion inconsistent with the Supreme Court's holding in *Wilson,* it is also in direct, irreconcilable conflict with the Tenth Circuit cases that served as the foundation for the Supreme Court's action.

It is, of course, the point of this petition that the Eleventh Circuit's decision is incorrect, and that the error is of such importance that this Court should grant certiorari and review the Court of Appeals' opinion. As asserted earlier, it is not only inconsistent with *Wilson v. Garcia,* — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985), it is also in direct conflict with the Tenth Circuit cases of *Hamilton v. City of Overland Park, Kansas,* 730 F.2d 613 (10th Cir., 1984), (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985); *Mismash v. Murray City,* 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2111 85 L.Ed. 2d 476 (1985); *McKay v. Hammock,* 730 F.2d 1367 (10th Cir., 1984) (en banc), and the seminal case of *Garcia v. Wilson,* 731 F.2d 640 (10th Cir., 1984) (en banc), *affirmed,* — U.S. —, 105 S.Ct.

1938, 85 L.Ed 2d 254 (1985). That conflict between the Tenth and Eleventh Circuits necessarily turns on the meaning of the language and the reasoning of this Court's opinion in *Wilson*. It was the Supreme Court's acceptance of the Tenth Circuit's characterization of all Section 1983 claims as "personal injury" actions that planted the seed of the dispute. Only because this Court so ruled in *Wilson*, was the Eleventh Circuit required to seek greater clarification for the meaning of "personal injury actions" in the Section 1983 context. Absent that new characterization, the Eleventh Circuit would have followed its old, two-prong test of identifying the "essential nature" of the claim and then analogizing that to the most appropriate state cause of action.[5] In finding that that phrase, as used by the Supreme Court, meant direct injuries in the nature of trespass, the Eleventh Circuit directly contradicted the Tenth Circuit and, petitioners believe, put itself at odds with the Supreme Court.

The Supreme Court's decision in *Wilson* was built upon the Tenth Circuit's unanimous *en banc* decisions in *Garcia v. Wilson*, 731 F.2d 640 (10th Cir., 1984) (en banc), *affirmed*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985); *Hamilton v. City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir., 1984) (en banc), *cert. denied*, — U.S. —, 105

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5. See, e.g., *Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama*, 670 F.2d 16 (5th Cir., Unit B, 1982); *McMillan v. City of Rockmart*, 653 F.2d 907 (5th Cir., Unit B, 1981); *Rubin v. O'Koren*, 644 F.2d 1023 (5th Cir., Unit B, 1981).

S.Ct. 2111, 85 L.Ed. 2d 476 (1985); *Mismash v. Murray City*, 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied*, — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985); and *McKay v. Hammock*, 730 F.2d 1367 (10th Cir., 1984) (en banc), all decided on the same day. Referred to collectively in the Supreme Court's opinion,[6] all of these cases must be read together as a body of legal reasoning. The Tenth Circuit clearly and intentionally decided the cases in an integrated fashion to assure consistency within the circuit; thus, the reasoning stated in each case likewise applies in an integrated fashion to all of the other cases. Clearly, the four cases can and should be read together as a package.

Three of the Tenth Circuit cases went to the Supreme Court on petitions for certiorari. Certiorari was granted in *Wilson v. Garcia* and the reasoning of the lower court was affirmed. Certiorari was denied in *Hamilton* and *Mismash*, allowing the opinions of court of appeals to stand unchanged. Although ordinarily no significance can or should be attached to denials of certiorari,[7] the integrated reasoning of these cases leads one to believe that these denials of certiorari represented tacit agreement by the Supreme Court with the results reached by the lower court.

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6. See *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985) fn. 10.

7. See *Brown v. Allen*, 344 U.S. 443 (1953); *Chessman v. Teets*, 354 U.S. 156, 164 n. 13 (1967). But see *United States v. Kras*, 404 U.S. 434 (1973); *Kraft Foods Co. v. Commodity Credit Corp.*, 266 F.2d 254 (7th Cir., 1959). See generally, Stern & Gressman, *Supreme Court Practice*, Section 5.7, pp. 353-60 (Fifth ed., 1978).

From among these cases the clearest, most direct conflict with the Eleventh Circuit's holding in the case at bar is found in *Hamilton v. City of Overland Park, Kansas,* 730 F.2d 613 (10th Cir., 1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 2111, 85 L.Ed. 2d 476 (1985). In that case, the court of appeals unequivocally rejected application of Kansas's one-year limitation for actions "for assault, battery, malicious prosecutions, or false imprisonment."[8] Relying expressly on its decision in *Garcia v. Wilson,* the Tenth Circuit held applicable Kansas's two-year limitation for actions "for injury to the rights of another, not arising on contract, and not herein enumerated."[9] Similarly, in *Mismash v. Murray City,* 730 F.2d 1366 (10th Cir., 1984) (en banc), *cert. denied,* — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 476 (1985), the Tenth Circuit rejected application of Utah's one-year statute for actions "for libel, slander, assault, battery, false imprisonment or seduction."[10]

The Tenth Circuit's reasoning for its holdings in *Hamilton* and *Mismash* can be found most clearly stated in *McKay v. Hammock,* 730 F.2d 1367 (10th Cir., 1984) (en banc), decided together with those cases and *Garcia.* Although *McKay* never went up to the Supreme Court, it, nonetheless, was one of the four integrated cases constituting the body of reasoning exemplified in *Garcia v. Wilson,* 731 F.2d 640 (10th Cir., 1984) (en banc), *affirmed,* — U.S. —, 105 S.Ct. 1938, 85 L.Ed. 2d 254 (1985). In *McKay,* the court of appeals also rejected Colorado's as-

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8. *Kansas Stat. Annot.* Section 60-514(2) (1976).

9. *Kansas Stat. Annot.* Section 60-513(a)(4) (1976).

10. *Utah Code Annot.* Section 78-12-29(4) (1953).

sault and battery statute of limitations.[11] The lower court reasoned as follows:

> The Colorado limitations statutes embody the common law distinction between trespass actions which involve injury by the direct and immediate application of force, and actions on the case, in which the injury is committed without direct force. [Citations omitted] Under Colorado law actions for assault and battery and false imprisonment are subject to the one-year period provided by Colo.Rev.Stat. Section 13-80-102 (1973) and actions on the case are subject to the six-year period provided in Colo.Rev.Stat. Section 13-80-110 (1973).
>
> Section 1983 claims may or may not involve the direct application of force. That distinction rests on factors irrelevant to the elements of a section 1983 cause of action and require an analysis of facts underlying a particular claim, an approach we rejected in in *Garcia*.[12]

The rationale stated in the four Tenth Circuit cases plainly indicates that court's recognition that Section 1983 claims are, today, much broader in scope than when originally created by Congress in 1871. a conclusion similarly reached by the Supreme Court.[13] Today, Section 1983 claims embrace a very wide spectrum of conduct, some of which may involve direct force, much of which does not.

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11. *See McKay v. Hammock*, 730 F.2d 1367 (10th Cir., 1984) (en banc); *Colorado Rev. Stat.* Section 13-80-102 (1973).

12. *McKay v. Hammock*, 630 F.2d 1367, 1370 (10th Cir., 1984) (en banc).

13. "When Section 1983 was enacted, it is unlikely that Congress actually foresaw the wide diversity of claims that the new remedy would ultimately embrace." *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 1946, 85 L.Ed. 2d 254 (1985).

The statute provides a general remedy for all injuries to federal rights, not merely injuries caused by direct application of force. It is logically inconsistent, therefore, to select a statute of limitation applicable only to a narrow set of the types of claims asserted under Section 1983. Just as it provides relief against conduct of a much broader scope than merely trespasses like assault and battery and false imprisonment, its statute of limitation must also be such as would cover the broader range of conduct. Most state's statutes of limitation for simple negligent personal injuries do just that.

The decision of the Eleventh Circuit in the case at bar stands in stark contrast to the well-reasoned opinions of the Tenth Circuit. The court below returned to an "essential nature" test and based its decision on factors found by the Tenth Circuit to be irrelevant to the new "personal injury action" analysis. The Eleventh Circuit rejected application of Alabama's then one-year general personal injury statute of limitation,[14] even though it contained language almost identical to the Kansas statute adopted by the Tenth Circuit in *Hamilton*.[15]

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14. *Alabama Code* Section 6-2-39(a)(5) (1975), repealed by *Acts of Alabama* of 1984, 2nd Exec. Sess., No. 85-39, Section 3, effective January 9, 1985, and replaced by *Alabama Code* Section 6-2-38(1) (Cumm. Supp., 1985); see fn. 3, *supra*.

15. Compare *Kansas Stat. Annot.* Section 60-513(a)(4) (1976) (providing a two-year limitation for actions for "injury to the rights of another, not arising on contract, and not herein enumerated") with *Alabama Code* Section 6-2-39 (a)(5) (1976) (providing a one-year limitation for actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section").

The importance of granting certiorari and reviewing the opinion of the Eleventh Circuit in this case grows not simply out of the need to resolve the conflict between these two circuits. A brief and by no means exhaustive review of the various states reveals that at least sixteen other states (excluding Alabama and Kansas) have different periods of limitation for general personal injury actions, on the one hand, and assault and battery trespass actions, on the other.[16] Clearly, this issue is not an isolated question, but one that will recur repeatedly as each lower federal court struggles to understand the meaning the Court attached to the phrase "personal injury action" in states where different *types* of personal injury actions have different limitation periods. Because the rule enunciated in *Wilson* is relatively new, it is appropriate for the Supreme Court now to take the additional step of giving greater clarity to the personal-injury action standard. Doing so now would aid the lower courts and avoid the tangle of conflicting opinions and inconsistent results bound

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16. See, e.g., *Arizona Rev. Stat.*, Section 12-542 and Section 12-541; *Arkansas Stat.* (1974) Section 37.206 and Section 37.201; *Connecticut Gen. Rev. Stat.* (1983) Section 52-577 and Section 52-584; *Michigan Comp. Laws Annot.* Section 600.5805; *Minnesota Stat.* (1982) Section 541.05 and Section 541.07; *Mississippi Code Annot.* (1972) Section 15-1-35 and Section 15-1-49; *Missouri Rev. Stat. of 1978* Section 516.120 and Section 516.140; *Montana Code Annot.*, Section 27-2-202 and Section 27-2-204; *Nebraska Rev. Stat.* (1943) Section 25-206, 207 & 214 and Section 25-208; *Gen. Stat. of North Carolina*, Section 1-52(5) and Section 1-54(2); *North Dakota Century Code Annot.* Section 28-01-16 and Section 28-01-18; *Ohio Rev. Code Annot.* Section 2305.10 and Section 2305.11; *Oklahoma Stat.* (1981) Section 12-95; *Code of Laws of South Carolina* (1976) Section 15-3-520 and Section 15-3-550; *Utah Code Annot.* (1953) Section 78-12-25 and Section 78-12-29; *Rev. Code of Washington* Section 4.16.080-090 and Section 4.16.100; *Wyoming Stat.* Section 1-3-105(a)(vi) and (a)(v).

to occur in the absence of a more definitive statement by this Court.

An excellent example of the burgeoning confusion can be found in two recent cases, *Gates v. Spinks*, 771 F.2d 916 (5th Cir., 1985) and *Shorters v. City of Chicago*, — F.Supp. —, No. 85-C-6078 (N.D. Ill., September 6, 1985). In the former case, decided after the case at bar, the Fifth Circuit resorted to reasoning similar to that used by the Eleventh Circuit in the present case, to hold that Section 1983 claims in Mississippi are subject to that state's one-year limitation on actions for assault and battery and false imprisonment. The Fifth Circuit rejected application of Mississippi's six-year statute of limitation for negligent personal injuries.[17] Conversely, in *Shorters v. City of Chicago*, the district court held that Illinois's statute of limitation for "actions for damages for an injury to the person, or for false imprisonment or malicious prose-

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17. *Gates v. Spinks*, 771 F.2d 916 (11th Cir., 1985), *citing*, *Mississippi Code Annnot.*, Section 15-1-49 (1972).

This case also reveals the danger inherent in following the reasoning of the Eleventh Circuit in the case at bar. In *Wilson v. Garcia*, the Supreme Court stated that by characterizing Section 1983 actions as personal injury actions, it was unlikely that states could discriminate against the federal remedy in setting periods of limitation. However, if one interprets "personal injury action" to mean direct trespass injuries, rather than simple negligent injuries, the result usually is a *shorter* limitation period. Although Alabama is a rare exception, in the main simple negligence personal injury actions have a *longer* limitation than trespass-type actions. Thus, by selecting trespass as the correct characterization, one immediately subjects the vast majority of Section 1983 claims to a far shorter limitation than under a negligence standard. See citations in note 16, *supra*.

cution. . . "[18] did *not* apply to Section 1983 claims because state law had always narrowly construed that statute to apply only to direct physical injuries and not to simple negligent personal injuries. The district court reasoned that the Supreme Court's opinion in *Wilson v. Garcia*, described "personal injury actions" in a way that recognized today's much broader scope for Section 1983 than simply the direct physical injuries originally contemplated in 1871. The court wrote:

> What all this means of course, is that the scope of Section 1983 is not at all limited to the whippings, lynchings, and worse that were the "specific historical catalyst" for its 1871 enactment. Such direct physical injury does not mark the outer boundaries of Section 1983 claims. Wilson plainly teaches its references to "personal injury" and "injuries to personal rights" encompass not only such injuries (of which the sheriff's racially-motivated fatal beating of a prisoner in the seminal case of *Screws v. United States*, 325 U.S. 913 (1945) is the archetype) but also the far wider range of harms that this and all other federal courts regularly treat with in Section 1983 litigation.[19]

The conflicting views of these two cases are simply extensions of the two lines of reasoning exemplified by the present case in contrast to the four Tenth Circuit cases referred to above. The importance of the case at bar is that it has created the danger that these conflicting views will continue to divide the lower federal courts in disagreement about the correct interpretation of the teachings in *Wilson v. Garcia*. To avoid the risk of an irreconcilable

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18. *Illinois Rev. Stat.*, chap. 110, Section 13-202.

19. *Shorters v. City of Chicago*, — F.Supp. —, No. 85-C-6078 (N.D. Ill., September 6, 1985).

split in the circuits, this Court should review this case, the first of its kind, to more clearly define the type of personal injury action the Court had in mind when that term was used in *Wilson v. Garcia.* Unlike *Runyon v. McCrary,* 427 U.S. 160, 96 S.Ct. 2586; 49 L.Ed. 415 (1976), where the issue was the court of appeals' interpretation of state law, this case involves the lower court's interpretation of the Supreme Court's own meaning in the phrase "personal injury action". The only definitive answer about that meaning, of course, can come only from the Supreme Court. Moreover, only the Supreme Court can correct the error of the Eleventh Circuit and re-introduce a uniform standard by which all federal courts are to select state statutes of limitation. Although states may split on the various types of personal injuries recognized, it is clear that every state has one and only one statute of limitation for simple negligent personal injuries, whereas not all states have a separate trespass personal injury limitation. Because greater consistency of reasoning and result can be obtained by mandating the application of each state's statute of limitation for simple negligent personal injuries, that is the meaning petitioners believe the Supreme Court intended in *Wilson v. Garcia.*

CONCLUSION

For the reasons asserted above, and particularly for the reason that the issue in this case has a profound effect on many Section 1983 cases yet to be litigated, petitioners respectfully request that the Supreme Court grant this petition and review and reverse the decision of the Court of Appeals.

Respectfully submitted,

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APPENDIX

Samuel JONES, Jr., Plaintiff-Appellant,

v.

PREUIT & MAULDIN, et al.,
Defendants-Appellees.

No. 84-7482

United States Court of Appeals,
Eleventh Circuit.

June 21, 1985.

On February 24, 1984, Samuel Jones filed suit against Preuit & Mauldin, a partnership engaged in the business of servicing equipment. The complaint alleged that on April 8, 1982, the defendants, acting pursuant to ALA. CODE § 35-11-111 (1975), obtained writs of attachment for three International Harvester cotton pickers belonging to Jones. The sheriff of Lawrence County seized the machines on April 18, 1982, without notice to Jones or a preseizure hearing. The attachment also took place prior to judgment in the defendants' underlying state court actions for a debt for repairs to the pickers. Jones claims that such prejudgment attachment procedures deprived him of due process of law in contravention of *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972), and its progeny. Jones brought this claim under 42 U.S.C.A. § 1983 (West 1981). The defendants moved for dismissal for failure to state a claim and for failure to bring the suit within the statutory time limit. The district court, 586 F.Supp. 1563, granted the motion and rejected the plaintiff's claim that the most relevant state statute was the

three-year statute governing suits on attachment bonds, ALA.CODE § 6-6-148 (1975). Instead, the court applied the one-year "catchall" statute of limitations, covering "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section." ALA.CODE § 6-2-39(a)(5) (1975). Since the plaintiff had filed suit 22 months after the attachment, the court dismissed the case.

I. STATEWIDE CHARACTERIZATION OF SECTION 1983 CLAIMS

Because Section 1983 does not contain a specific statute of limitations, U.S.C.A. § 1988 (West 1981) directs courts to select and apply the most appropriate or analogous state statute of limitations. *Burnett v. Grattan,* — U.S. —, 104 S.Ct. 2924, 82 L.Ed.2d 36 (1984); *Board of Regents v. Tomanio,* 446 U.S. 478, 483, 100 S.Ct. 1790, 1794, 64 L.Ed.2d 440 (1980); *Johnson v. Railway Express Agency, Inc.,* 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed2d 295 (1975). So long as that analogous state provision is not inconsistent with the policies underlying the federal cause of action, *Johnson,* 421 U.S. at 465, 95 S.Ct. at 1722; *Ehlers v. City of Decatur,* 614 F.2d 54 (5th Cir.1980), a federal court may treat the state statute of limitations as controlling.

In this Circuit the choice of an appropriate state statute has proceeded in two steps. First, the court determines the "essential nature" of the claim. Federal law determines the essential nature of the claim, yet federal law resolves question largely by reference to state law. *Shaw v. McCorkle,* 537 F.2d 1289 (5th Cir.1976). Second, the court decides which statute of limitations a state court

would apply if faced with a claim of the same type or class as the Section 1983 claim. *Beard v. Stephens*, 372 F.2d 685 (5th Cir.1967).

The Supreme Court's recent decision in *Wilson v. Garcia*, — U.S. —, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), relieves this court of the difficult task of characterizing the essential nature of Section 1983 claims in varying contexts.[1] The Court in *Wilson* held first that the char-

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1. Despite the single structure for analysis, courts in this Circuit have used subtle but important differences in characterizing the essential nature of various Section 1983 claims. Some courts have denominated the facts as alleged in the complaint and a generalized statement of the legal claim as the essential nature of the claim. *See Nathan Rodgers Construction & Realty Corp. v. City of Saraland, Alabama*, 670 F.2d 16 (5th Cir. Unit B 1982) (essential nature is "suit against a city, its councilmen and mayor for an asserted denial of property rights resulting from delay in the issuance of a sewer permit"); *Prince v. Wallace*, 568 F.2d 1176 (5th Cir. 1978); *Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967). Other courts have gone one step further and used this literal description of the federal claim to group it with similar state law claims. *See Whatley v. Department of Education*, 673 F.2d 873 (5th Cir. Unit B 1982) (employment due process claims grouped together with actions for recovery of lost wages); *see also McGhee v. Ogburn*, 707 F.2d 1312 (11th Cir.1983); *Sewell v. Grand Lodge of the International Association of Machinists and Aerospace Workers*, 445 F.2d 545 (5th Cir.1971), *cert. denied*, 404 U.S. 1024, 92 S.Ct. 674, 30 L.Ed.2d 674 (1972).

Under the first approach, most of the work of evaluating the strength of the relationship between the federal claim and various state claims is left for the second step of the process. State law controls the evaluation. If the facts and general description of the federal claim could not be reframed as a viable state law cause of action with a special statute of limitations, the claim would fall into the state's catchall provision simply because a state court would place it there. By contrast, under the second approach the crucial evaluation is drawn at the first stage of the inquiry, where

(Continued on following page)

acterization of a Section 1983 claim for statute of limitations purposes is a question of federal law. Next, the Court held that a simple and uniform characterization of all Section 1983 claims best fits the statute's remedial purpose because a uniform characterization prevents the "uncertainty and time-consuming litigation" caused when courts predicate their choice of the correct statute of limitations "on an analysis of the particular facts of each claim." 105 S.Ct. at 1945. Hence, federal courts must "select, in each State, the one most appropriate statute of limitations for all § 1983 claims." *Id.* at 1947.

Finally, the *Wilson* court held that federal courts hearing claims under Section 1983 should borrow the state limitations statute governing "personal injury" claims rather than a "catchall" limitations period, a limitations statute for damage to property or breach of contract, or a limitations statute governing suits against public officials. The task facing this court, therefore, is to choose the one Alabama limitations statute governing claims for recovery of damages for "personal injury" that federal

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(Continued from previous page)

state law is informative but not controlling. Thus, even if the complaint could not be recast as a state cause of action with a special statute of limitations, the court asks whether there is any state claim of the same general type.

The *Wilson* decision departs from both of these approaches because it characterizes all Section 1983 claims without regard to the particular facts underlying individual claims. Because previous precedents in this Circuit were decided under methods inconsistent with the *Wilson* analysis, we must determine anew the appropriate statute of limitations under Alabama law.

courts should borrow for purposes of 42 U.S.C. § 1983 (West 1981).[2]

II. ESSENTIAL NATURE OF SECTION 1983 PERSONAL INJURY CLAIMS

Two Alabama statutes govern the limitations periods for bringing personal injury suits. The six-year statute, ALA.CODE § 6-2-34(1) (1975), governs all actions "for any trespass to person or liberty, such as false imprisonment or assault and battery." The one-year statute, ALA. CODE § 6-2-39(a)(5) (1975), applies to actions "for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."[3] The choice between these two statutes depends upon whether the wrongful act constitutes a trespass or a trespass on the case: Section 6-2-34(1) governs trespass actions while Section 6-2-39(a)(5) governs trespass on the case. *C.O.*

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2. The defendants have not suggested to this Court that *Wilson* should only apply prospectively. We also note that the defendants have taken no action in reliance on precedent overruled by *Wilson*, and the policies of intra-state uniformity and certainty that underlie the *Wilson* decision would be hindered by failure to apply the decision retroactively. Each of these facts cuts in favor of retroactive application of *Wilson* against the defendants under *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-356, 30 L.Ed.2d 296 (1971).

3. Since the filing of this appeal, the Alabama legislature has repealed Section 6-2-39 and extended the relevant limitations period to two years. *See* Act of Jan. 9, 1985, No. 85-39 1984 Ala.Acts—(to be codified at ALA.CODE § 6-2-38(1)). Because we hold that Section 6-2-34(1) is the appropriate state statute of limitations, we do not decide which version of the catchall statute (the statute dealing with personal injury claims sounding in trespass on the case) would be applied as a matter of federal law in this case.

Osborn Contracting Co. v. Alabama Gas Corp., 273 Ala. 6, 135 So.2d 166 (1961); *Smith and Gaston Funeral Directors v. Dean*, 262 Ala. 600, 80 So.2d 227 (1955); *Pennick v. City of Florala*, 529 F.2d 1242 (5th Cir. 1976); *Beard v. Stephens*, 372 F.2d 685 (5th Cir.1967). The choice of the proper and analogous Alabama statute for purposes of Section 1983 claims will depend, then, on whether the "personal injury" that is the essential nature of all Section 1983 claims is more akin to trespass or trespass on the case. This calls for some elaboration on the "essential nature" of Section 1983 claims and is therefore a question of federal law, but one that may be informed by the state law definition of trespass and trespass on the case.

Under Alabama law, trespass involves an intentional act done with force and immediately injurious to the person of another or to property in his or her possession. Trespass on the case would lie when the wrongful act causes harm only indirectly and without an intentional act of force.[4] *W.T. Ratliff Co., Inc. v. Henley*, 405 So.2d 141 (Ala.1981). Trespass requires intentional or "wanton" causation of injury as opposed to mere negligence, *City of Fairhope v. Raddcliffe*, 48 Ala.App. 224, 263 So.2d 682 (1972); *Cochran v. Hasty*, 378 So.2d 1131 (Ala.Civ.App.

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4. Alabama has modified the common law distinction between trespass and case, but the direct/indirect distinction remains a dominant method for separating the two causes of action in cases involving injury to the person. An indirect injury is one that is merely "consequential" and not a direct result of the wrongful act. The presence of some intervening contributory cause shows that an act is the indirect cause of injury. *Sasser v. Dixon*, 290 Ala. 17, 273 So.2d 182 (1973); *see Borland v. Sanders Lead Co. Inc.*, 369 So.2d 523 (Ala. 1979) (establishing elements of proof for indirect trespass to property).

1979), or an omission of a duty to act. *Sasser v. Dixon*, 290 Ala. 17, 273 So.2d 182 (1973). Liability based on *respondent superior* is framed as trespass on the case. *C.O. Osborn Contracting Co. v. Alabama Gas Corp.*, 273 Ala. 6, 135 So.2d 166 (1961).

The characterization of Section 1983 claims given by the Supreme Court in *Wilson* resembles an action in trespass on the case. The Court analyzed the legislative history of the Reconstruction Civil Rights Acts and noted that the specific historical catalyst for those statutes was the "campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." 105 S.Ct. at 1947. *See generally* A. TRELEASE, WHITE TERROR 261-73 (1971) (describing activities of Ku Klux Klan in northern Alabama). The Congress had been especially concerned with murder, whippings, lynchings and banishings; the statutory remedy for violation of constitutional rights was meant to restore peace and justice. 105 S.Ct. 1947; *see also Briscoe v. LaHue*, 460 U.S. 325, 336-40, 103 S.Ct. 1108, 1116-18, 75 L.Ed.2d 96 (1982). These acts of violence are all "direct" and intentional injuries to the person that would sound in trespass. *Cf. Beard v. Stephens*, 372 F.2d 685 5th Cir.1967); *Holcombe v. Whitaker*, 294 Ala. 430, 318 So.2d 289 (1975); *Donald v. Swann*, 24 Ala.App. 463, 137 So. 178, *cert. denied*, 223 Ala. 293, 137 So. 181 (1931).

On the other hand, the remedy ultimately chosen by the 42d Congress in Section 1983 did not address only those wrongs that most concerned the legislators. Klan activities epitomized a general inadequacy and inequality in state law enforcement. *Monroe v. Pape*, 365 U.S. 167, 172-83, 81 S.Ct. 473, 476-82, 5 L.Ed.2d 492 (1961). The "uni-

fying theme" of the statutes, equality of all persons under the law, constituted a goal much broader than the prevention of physical violence. *Wilson*, 105 S.Ct. at 1947. Nothing in the language or legislative history limits Section 1983 solely to intentional deprivations of constitutional rights. *Parratt v. Taylor*, 451 U.S. 527, 534, 101 S.Ct. 1908, 1912, 68 L.Ed.2d 420 (1981); *Baker v. McCollan*, 443 U.S. 137, 139-40, 99 S.Ct. 2689, 2692-93, 61 L.Ed.2d 433 (1979).

Obviously, then, some Section 1983 claims will sound in trespass and others in trespass on the case. Some will involve direct injuries, *Shillingford v. Holmes*, 634 F.2d 263 (5th Cir. Unit A 1981) (unjustified assault on citizen by police officer, and others will involve indirect injuries. *Glover v. Alabama Department of Corrections*, 734 F.2d 691 (11th Cir.1984) (prison official induces several prisoners to assault another prisoner), or injuries caused without the use of force, *Espanola Way Corp. v. Meyerson*, 690 F.2d 827 (11th Cir.1982) (city commissioners' alleged harassment of business through excessive regulation), *cert. denied*, 460 U.S. 1039, 103 S.Ct. 1451, 75 L.Ed.2d 791 (1983). As the Supreme Court has stated, "[a] catalog of . . . constitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics." *Wilson*, 105 S.Ct. at 1947. The Section 1983 remedy encompasses a broad range of tort analogies. *Id.* at 1947.

The "essential nature" of a Section 1983 personal injury claim cannot, therefore, be determined simply by asking for which of the state law causes of action personal injury, such as trespass or trespass on the case, could also be brought under the federal statute. That question yields

too many answers. The appropriate characterization of Section 1983 personal injury claims must be determined by searching the legislative history of the statute and isolating the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators intended first and foremost to address. The Supreme Court in *Wilson* made such a determination in order to conclude that Section 1983 claims are personal injury claims rather than general statutory claims falling within a catchall limitations statute. The scarcity of statutory claims in 1871 and the primacy of constitutional claims under Section 1983 prevented the use of a state catchall statute. Constitutional claims are only a subset of the claims falling within the Section 1983 remedy, but they were the most significant subset in the eyes of the 42d Congress. *Wilson*, 105 S.Ct. at 1947.

Similarly, personal injuries sounding in trespass make up the most significant subset of claims within Section 1983. The paradigmatic personal injuries covered by the statute, those that motivated the Congress to take action, were acts of international and direct violence on the part of the Ku Klux Klan. The 1871 Act was enacted after President Grant described for Congress the breakdown of law and order in the Southern States. Conditions "rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous" led the President to ask for legislation. The President's request stated that proof of the conditions in the South had been presented to the Senate. S.REP. NO. 1, 42d Cong., 1st Sess. (1871). That Senate Report, relied upon extensively by the Congress, *see CONG. GLOBE*, 42d Cong., 1st Sess. App. 166-67 (1871) (remarks of Rep. Williams), detailed murders, whippings and other acts of violence on the part

of the Klan. Senator Sherman's original resolution calling for the passage of a bill was motivated by the activities of armed men who had "by force, terror and violence subverted all civil authority, . . . overthrowing the safety of persons and property and all those rights which are the primary basis and object of all civil government." The bill would "punish such organized violence." *Id.* at 152.

The debates focused on arson, robbery, whippings, shootings, murders, and other forms of violence and intimidation perpetrated by the Klan. *Briscoe v. LaHue*, 460 U.S. 325, 337, 103 S.Ct. 1108, 1117, 75 L.Ed.2d 96 (1982). These primary wrongs were only compounded by the lack of effective state law remedies. When the legislators complained that the state authorities had been unable or unwilling to protect the constitutional rights of individuals, *see Patsy v. Board of Regents of Florida*, 457 U.S. 496, 505, 102 S.Ct. 2557, 2562, 73 L.Ed.2d 172 (1982), they usually meant that a black citizen had no recourse against illegal acts of violence or trespass. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871) (remarks of Rep. Lowe) ("While murder is stalking abroad in disguise, while whippings and lynchings and banishings have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective."); *id.* at 156 (remarks of Sen. Sherman) (Klansmen do not "think it any crime to kill a negro or rob a Yankee"); *id.* at 199-200 (remarks of Sen. Nye); *id.* at 320-21 (remarks of Rep. Stoughton); *id.* at 441-444 (remarks of Rep. Butler).

The extensive legislative history demonstrates that members of the 42d Congress considered direct acts of violence against black citizens to be the paradigmatic

wrong addressed by the new statute. Hence, the essential nature of a Section 1983 claim fits the description of trespass under Alabama law. We conclude on the basis of Congressional intent and the Supreme Court's opinion in *Wilson v. Garcia, supra,* that a Section 1983 claim should be characterized as a personal injury action along the lines of a trespass. Therefore, federal courts in Alabama will borrow the length of the limitations period as found in ALA.CODE § 6-2-34(1) (1975), together with the proper state law treatment of related questions of tolling and application. That statute contains a six-year limitation period. Jones filed his suit before this limitation period had elapsed and the district court improperly dismissed the case.[5]

REVERSED.

Samuel JONES, Jr., Plaintiff.

v.

PREUIT & MAULDIN, etc., et al., Defendants.

Civ. A. No. 84-AR-5131-NW.

United States District Court,
N.D. Alabama,
Northwestern Division.

June 15, 1984.

MEMORANDUM OPINION

ACKER, District Judge.

This action was brought by plaintiff, Samuel Jones, Jr. (Jones), pursuant to 42 U.S.C. § 1983 charging that

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5. The defendants do not raise any alternative basis for affirming the district court's dismissal of the case.

certain of plaintiff's property was wrongfully seized under color of state law by constitutional violation inherent in the attachment procedure. The portion of the complaint here pertinent alleges that the "procedure did not comply with the requirements of the Fourteenth Amendment concerning deprivations of property without due process of law in relation to prejudgment seizures of property". The alleged constitutional deprivation occurred on April 8, 1982. Jones filed his complaint on February 24, 1984. Defendants have filed a motion to dismiss the complaint, asserting as an absolute defense the statute of limitations of one year. If defendants are correct and if the applicable statute of limitations is one year, then plaintiff is clearly barred on the face of his complaint. If, however, the applicable statute of limitations is three years, as Jones contends, then his action may proceed to a hearing on the merits.

It no longer requires citation of authority for the proposition that because § 1983 itself contains no statute of limitations, the federal courts look to and apply the state statute of limitations most nearly analogous to the particular § 1983 claim being brought. However, as was eloquently elucidated by Hon. Robert Propst in *Fomby v. City of Calera*, 575 F.Supp. 221, 223 (N.D.Ala. 1983), "[t]he *choice* of a limitations period for a *federal* cause of action is itself a question of *federal* law". (emphasis supplied). This Court thoroughly agrees with Judge Propst. Judge Propst's persuasive rationale is reminiscent of one of the opening scenes in Gone With The Wind, which contains the following dialogue taking place among field hands at the close of the day, with Tara in the distant background. The scene

in the screen play is called "Quitting Time at the Plantation". Most serious moviegoers will remember.

Scene

> Cotton field, with field hands at work plowing furrows. The bell at Tara is heard faintly. One of the hands, Elijah, stops.
>
> *Elijah*: Quittin' time!
>
> Another huge black man, known as Big Sam, turns on Elijah sharply:
>
> *Big Sam*: Who said?
>
> *Elijah*: I sez.
>
> *Big Sam*: You can't sez. I'se de foahman. I'se de one dat sez when it's time to quit [He calls out loudly to the other hands.] QUITTIN' TIME!

To paraphrase Big Sam inversely and to reiterate Judge Propst, it is the *federal* court which says when it is "STARTIN' TIME" under § 1983. Although the federal court must look to the state law for the appropriate statute of limitations, it is not the state which "sez" what particular statute of limitations the federal court must apply. The state simply furnishes its various statutes of limitations for perusal and selection by the federal court in the context of the particular § 1983 complaint.

Jones here urges that the Alabama statute of limitations more nearly analogous to his situation is Ala.Code § 6-6-148 (1975), which reads as follows:

> At any time within three years of the suing out of the attachment, before or after the action is determined, the defendant in attachment may commence an action on the attachment bond and may recover such

> damages as he has actually sustained if the attachment was wrongfully sued out and, if sued out of maliciously as well as wrongfully, the jury may, in addition, give vindictive damages.

On the other hand, defendants assert that the here appropriate statute of limitations is Ala.Code § 6-2-39(a)(5) (1975), which reads as follows:

> (a) The following must be commenced within one year:
>
> * * *
>
> (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section.

Jones must acknowledge that his is not a suit on a *bond,* which admittedly is a specialized form of contract and, if sued upon, constitutes an action *ex contractu.* Rather, Jones insists that his action, although admittedly *ex delicto,* is controlled by the three year statute provided by Ala.Code § 6-6-148 (1975) for suits on attachment bonds. He relies entirely upon a *dictum* in *Goldstein v. Nobles,* 198 Ala. 430, 73 So. 822 (1916). This hoary case contains language which Jones would interpret to give him a three year statute of limitations. He would give a significance to *Goldstein* which does not bear up under careful analysis. The pertinent language from *Goldstein* is as follows:

> Section 2966 of the Code of 1907 [6-6-148] authorizes suit upon the bond any time within three years *before* or after suit is determined, and our court has held that *this right* exists as to the common-law action as well as a suit upon a bond. *Alsop v. Lidden,* 130 Ala. 553, 30 South. 401; *Brown v. Master,* 104 Ala. 463, 16 South. 443. It is true these cases construed the statute as it existed prior to the Code of 1907, and a part of sec-

> tion 565 of the Code of 1896 (now section 2966 of the Code of 1907) was left out of the present Code, but there was no change as to *the right to bring the action either before or after the determination of the suit.* It has also been held that this statute applies to actions for the wrongful suing out of garnishments as well as attachments. *Barber v. Ferrill,* 57 Ala. 446. Hence the trial court did not err in overruling the defendant's demurrer to the complaint for failing to aver that the suit had been determined, or in sustaining the demurrers to the special pleas setting up that this action was *prematurely brought.* (emphasis supplied).

198 Ala. at 431-32; 73 So. at 823.

To understand *Goldstein* the first important fact to recognize is that the issue presented here by Jones was ***not*** presented in *Goldstein.* Nowhere was the Supreme Court in *Goldstein* confronted with the question of whether or not the victim of a wrongful attachment can bring a tort action for wrongful attachment at any time within three years after the occurrence. Rather, in *Goldstein* the issue was simply whether or not a tort action for an allegedly wrongful attachment can be brought *before* a determination in the main case of the question of whether or not the attachment was, in fact or law, erroneous and therefore "wrongful". If the Alabama Court really meant to say that there is a three year statute of limitations for the *tort* of wrongful attachment (which this Court disputes, ***infra***) its inartful expression of the thought in *Goldstein* was not a part of its holding, was unnecessary to its decision, and thus was pure *dictum. Dictum* is not the stuff for the fashioning of a new § 1983 limitation.

Secondly, and more importantly, this Court does not believe that the Alabama Court in 1916 either believed or

intended to express a belief that the statute of limitations for wrongful attachment is three years in Alabama. Not only has the Alabama Court never reiterated or hinted any such intent between 1916 and this date in 1984, but that court's limited intent can be discerned from the language which the court actually used. Its language may have been somewhat misleading, but what it was trying to say becomes clear upon a careful reading. When the court said "[s]ection 2966 of the Code of 1907 [§ 6-6-148] authorizes suit upon the bond any time within three years *before* or after suit is determined, and our court has held that *this right* exists as to the common-law action as well as a suit upon a bond" (emphasis supplied), the argument was to justify the bringing of a common law action *before* a determination of the efficacy of the garnishment writ. 73 So. at 823. The gratuitous use of the words "or after" was not intended by the Alabama Court to be related grammatically to the three year statute of limitations, but rather to support the elimination of the defense of prematurity where such a suit is brought before a final determination of the legal effect of the attachment. While its grammar may have been imperfect, the Alabama Court's reasoning shines through.

Thirdly, the Alabama Court's citation of *Alsop v. Lidden,* 130 Ala. 548, 30 So. 401 (1901) and *Brown v. Master,* 104 Ala. 451, 16 So. 443 (1894), as authorities for its proposition again proves the limitation on that Court's holding. Neither *Alsop* nor *Brown* involve a choice between statutes of limitations. To the contrary, both of these earlier cases deal with the defense of prematurity where there had been no predetermination of a want of probable cause for an attachment or a garnishment. This is a distinction sim-

ilar to the well recognized distinction between the cause of action known as "malicious civil prosecution" (which requires a prior adjudication against the prosecuting party) and the cause of action known as "abuse of process" (which does not require such a prior adjudication). The Alabama Court was, of course, correct in holding that the common law or *ex delicto* action for wrongful attachment does not have as a prerequisite a judicial determination that the attachment was wrongful. It is a *non sequitur* which the Alabama Court could not have meant to indulge to jump to the conclusion that a person having such an *ex delicto* cause of action can wait three years to bring suit simply because he can bring an action *ex contractu* on the attachment bond within three years.

Fourthly, the sharp difference between a contract claim and a tort claim cannot be overemphasized. In the classic tort action all actual damages (and even punitive damages under some circumstances) proximately caused by the wrongful act, are recoverable. However, in a suit on a bond the face amount of the bond places a limitation on the amount of recovery, whether the damages are actual, or punitive, or both. Perhaps it would be theoretically possible to draft a bond of an unlimited monetary amount covering all possible losses resulting from a breach of the bond. But this Court is not here dealing with such an hypothetical bond but with the law of Alabama which does not contemplate the execution of a bond of unlimited amount in order to obtain a writ of attachment. See Ala.Code §§ 6-6-45, 6-6-120 (1975).

Lastly, it is not necessary for this Court to explain or to avoid the 1916 *dictum* in *Goldstein*. The more recent truth, as expressed in *Fomby v. City of Calera, supra*, is

that a federal court in ascertaining the proper period of limitations in § 1983 cases must look to the "essential nature" of the claim and cannot be controlled by the tag which the plaintiff may put on it. *See Beard v. Stephens*, 372 F.2d 685 (5th Cir. 1967). Applying this federal rule, this Court finds that the "essential nature" of Jones' claim, *as unequivocally described in his own complaint*, is that he sustained damages as a proximate consequence of a denial of "due process". It is impossible to squeeze such a claim into the would-be category of a suit on an attachment bond in order to push the limitations period beyond one year. Jones' wishful thinking is well argued by counsel, but it ultimately fails. In *Harrison v. Emens*, 235 Ala. 319, 179 So. 219 (1938) the Supreme Court of Alabama recognized that the "essential nature" of a claim for wrongful attachment (whether brought on the attachment bond [*ex contractu*] or directly for vexatious or malicious conduct [*ex delicto*]) is tort-like. There, in a suit brought on an attachment bond, the Alabama Court said:

> While the action is on the bond, as authorized by Code 1923, § 6214 [6-6-148], yet so far as "the nature and character of the evidence necessary to sustain it, is to be considered, *bears a closer resemblance to an action for malicious prosecutions, than to any other action at common law.* It is necessary for the plaintiff to aver in his complaint, the falsity of the particular fact, or facts, which may be stated in the affidavit as the ground of attachment. *Tiller v. Shearer*, 20 Ala. 527. The averment of the falsity of the affidavit, though it may be negative in form, and may involve proof of a negative, casts on the plaintiff the onus of supporting it by evidence either direct, or of circumstances from which the jury may fairly infer the untruth of the fact or facts stated in the affidavit.

> The right of recovery rests on the wrongful or vexatious use (or both), of the extraordinary and harsh remedy by attachment in [and] this forms the gravamen of the plaintiff's complaint. *O'Grady v. Julian*, 34 Ala. 88." *Durr v. Jackson*, 59 Ala. 203.
>
> It is not essential to the existence of a cause of action that the attachment should be both wrongful and vexatious or malicious, but *it is essential that it be wrongful;* that is, that no debt exists for the collection of which the extraordinary process may be resorted to, or if such debt exists, that no ground for the issuance of the writ in fact existed. (emphasis supplied).

235 Ala. at 320; 179 So. at 219-20.

It is of more than passing interest that the cause of action, i.e., malicious prosecution, which the Court in *Harrison* found to bear a close resemblance to one for wrongful attachment, has a one year statute of limitations. *See* Ala.Code § 6-2-39(a)(1) (1975). It is inconceivable to this Court that the Alabama Legislature intended, when it enacted § 6-6-148, to provide two years beyond the "catch-all" statute and beyond the "malicious prosecution" statute when a claim for wrongful attachment is brought, *not on the bond, but on a common law theory of wrongful attachment most closely resembling malicious prosecution.* It would indeed be a strained construction of § 6-6-148 to find in it a waiver of the one year statute of limitations contained both in § 6-2-39(a)(1) and in § 6-2-39(a)(5).

The statute of limitations in Alabama for claims arising out of violations of "due process" rights has routinely been considered by the Alabama courts and by the federal courts to be the "catch-all" one year statute of limitations contained in § 6-2-39(a)(5). Not only is this

the clear holding of the Supreme Court of Alabama in *Limbaugh v. Johnston,* 393 So.2d 963 (Ala.1981), but the Alabama Court is clearly echoed in *Rubin v. O'Koren,* 644 F.2d 1023 (5th Cir. Unit B, 1981), and in *Nathan Rodgers Construction & Realty Corp. v. City of Saraland,* 670 F.2d 16, 20 (5th Cir. Unit B), *reh'g denied* 676 F.2d 162 (5th Cir. Unit B, 1982) where the embryonic Eleventh Circuit said:

> [T]he one-year statute applied by the district court covers 'actions for any injury to the person or rights of another not arising from contract' Ala.Code § 6-2-39(a)(5). This is such an action.

To put it simply, the "essential nature" of Jones' complaint does not involve an attachment bond. Rather, the gravamen of his complaint is an alleged due process deprivation.

Not out of the pride manifested in Big Sam's expression of his prerogative as boss in the cotton field, but because the duty of a federal court is to select the most appropriate state statute of limitations in § 1983 actions, and because this Court deems that Jones' complaint of a constitutional denial of "due process" makes § 6-2-39(a)(5) a more analogous statute than anly analogy which can be drawn as to a case brought under § 6-6-148, the Court concludes that defendants' motion to dismiss is due to be granted. Plaintiff's complaint is therefore time barred.

An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA NORTHWESTERN DIVISION

CIVIL ACTION NO. 84-AR-5131-NW

Entered: 6/15/84

SAMUEL JONES, JR.,

Plaintiff

vs.

PREUIT & MAULDIN, etc., et al.,

Defendants

ORDER

In conformity with the accompanying Memorandum Opinion, it is ORDERED that defendants' motion to dismiss be and the same is hereby GRANTED. Plaintiff shall have and recover NOTHING of defendants, and this action is hereby DISMISSED without prejudice to any state claim on an attachment bond.

Costs are taxed against plaintiff.

DONE this 15th day of June, 1984.

/s/ William M. Acker, Jr.
WILLIAM M. ACKER, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7482

D.C. Docket No. 84-5131

SAMUEL JONES, JR.,

Plaintiff-Appellant,

versus

PREUIT & MAULDIN, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

---

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the order of the

District Court appealed from, in this cause be and the same is hereby, REVERSED;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: June 21, 1985

For the Court: Spencer D. Mercer, Clerk

By: Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: September 4, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7482

SAMUEL JONES, JR.

Plaintiff-Appellant,

versus

PREUIT & MAULDIN, et al,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion June 21, 11 Cir. 1985, — F.2d —).
(August 22, 1985)

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Frank M. Johnson, Jr.

United States Circuit Judge

Supreme Court, U.S.
FILED
DEC 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-794

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PREUIT & MAULDIN, a partnership; and E. F. MAULDIN, individually and as Executor of the estate of Leonard Preuit, deceased; and PREUIT MAULDIN,

Petitioners

v.

SAMUEL JONES, JR.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF ALABAMA IN SUPPORT OF PETITIONER

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No. 85-794

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

PREUIT & MAULDIN, a partnership; and E. F. MAULDIN, individually and as Executor of the estate of Leonard Preuit, deceased; and PREUIT MAULDIN,

Petitioners

v.

SAMUEL JONES, JR.,

Respondent

BRIEF OF AMICUS CURIAE STATE OF ALABAMA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The State of Alabama, through its Attorney General, offers this brief as amicus curiae in support of the petition for writ of certiorari sought by Preuit & Mauldin, et al.

This is a 42 U.S.C. § 1983 action challenging the constitutionality of Alabama's pre-judgment attachment procedure. The

specific question presented is which state statute of limitation is applicable to such a § 1983 civil rights action.

The lower court's decision and this court's decision on the issue presented could materially and drastically affect the State of Alabama and all its departments, officers and employees. Thousands of officers and employees of the State of Alabama take action daily under color of state law and thus subject themselves and the State to suit under 42 U.S.C. § 1983. The State of Alabama, through its Attorney General, must defend well in excess of one thousand new such suits annually. If the lower court ruling stands, the limitation period on civil rights actions will be increased from two to six years. It can thus be expected that the number of such suits filed will be substantially increased and that the state's burden in defending such suits, the overwhelming majority of which are

unfounded if not trivial and frivilous, will likewise be substantially increased. Although the State rarely looses one of these suits, when it does Plaintiffs' attorney's fees are generally taxed against the S ate or its agencies. Thus the State of Alabama and its Attorney General are vitally interested in which statute of limitation is applicable to civil rights actions.

ARGUMENT

This Court held in Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) that 42 U.S.C. § 1983 civil rights claims are best characterized as personal injury actions for state statute of limitation purposes. The narrow question presented to this Court for review is what kind of personal injury action limitation should apply. Alabama, like several other states, has two separate statutes of limitation governing personal injury actions. First, Alabama has a six-year limitation on "actions on any trespass to persons or liberty, such as false imprisonment or assault and battery".[1] This is a narrow limitation applicable only to direct intentional trespass injuries. Second, Alabama has a two-year limitation on "all actions for any injury to the person or rights of another not arising from contract and not

---

[1] Code of Alabama 1975, § 6-2-34(1)

specifically enumerated in this section."[2] This limitation is much broader than the six-year limitation on trespass actions, and is applicable to indirect, trespass-on-the-case injuries. The Eleventh Circuit, in its opinion in this case, held that the narrow two-year limitation on direct trespass injuries is applicable to § 1983 actions in Alabama.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

As Petitioners have argued, the decision

---

[2] Code of Alabama 1975, § 6-2-38(1). At the time this action arose and was brought in the district court, the language quoted was found in § 6-2-39(a)(5) and provided for a one-year limitation on such actions. On Jan. 9, 1985, however, the Governor signed Act 85-39 which repealed § 6-2-39 and changed the statute of limitations for "any injury to the person or rights of another" to two years by incorporating that langauge into § 6-2-38, which enumerates actions for which there is a two year limitation. The material and operable language of the old and new statutes are the same. The only substantive difference is the length of time within which an action must be brought. For purposes of this brief we will speak of the new two-year limitation.

below conflicts with the decisions of the Tenth Circuit. The decision is in direct conflict with Hamilton v. City of Overland Park, 730 F.2d 613 (10th Cir., 1984), (en banc), cert. denied, __ U.S. __, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985); Mismash v. Murray City, 730 F.2d 1366 (10th Cir., 1984) (en banc), cert. denied, __ U.S. __, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985); McKay v. Hammock, 730 F.2d 1367 (10th Cir., 1984) (en banc), and the seminal case of Garcia v. Wilson, 731 F.2d 640 (10th Cir., 1984) (en banc), affirmed, ____ U.S. ____, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Petitioners have quite sufficiently set forth their arguments, and amicus will not repeat them. We will point out that the Eleventh Circuit in its opinion made no effort to reconcile its decision with those of the Tenth Circuit, but ignored the conflict. The conflict is not a minor, reconcilable or tolerable difference; but is a conflict that most deserves this Court's attention.

II. THE DECISION BELOW IS INCONSISTENT WITH A PRIOR DECISION OF THIS COURT

As petitioner has argued, the decision below is inconsistent with Wilson v. Garcia, ____ U.S. ____, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Again, amicus will not repeat Petitioner's arguments in this regard. We will, however, make one additional point.

This Court in Wilson, in support of its holding that civil rights actions are best characterized as personal injury actions, observed that "general personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the State courts today." The great bulk of personal injury lawsuits in Alabama as elsewhere are not trespass actions, but are indirect, trespass-on-the-case actions. It is apparent that this Court in Wilson contemplated application of state limitations on trespass-on-the-case actions to Federal civil rights claims. The decision below, in holding

the period of limitation for trespass actions applicable to § 1983 claims, is thus inconsistent with Wilson.

III. THE DECISION BELOW PRESENTS A SUBSTANTIAL QUESTION OF FEDERAL LAW THAT SHOULD BE REVIEWED BY THIS COURT.

As Petitioners point out, at least eighteen states have different periods of limitation for general personal injury actions than for assault and battery trespass actions. These eighteen states lie in eight different circuits. No doubt the same question about the interpretation of Wilson raised in this case will continue to be raised in these other circuits.

The application of a uniform rule for determining what state statute will apply in § 1983 cases is as important today as it was when this Court granted certiorari in Wilson. In order to give Wilson any real meaning uniform application in the eighteen states

with dual limitation periods for personal injury actions, it is important that the Supreme Court address the issue raised in this case.

CONCLUSION

For the reasons stated by Petitioners and for the reasons stated above, writ of certiorari should be granted.

Respectfully submitted,

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Supreme Court, U.S.
FILED
DEC 3 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-794

IN THE

Supreme Court Of The United States

October Term, 1985

PREUIT & MAULDIN, a partnership;
E. F. MAULDIN, individually and as Executor
of the estate of Leonard Preuit, deceased;
and PREUIT MAULDIN,
Petitioners

vs.

SAMUEL JONES, JR.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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No. 85-794

IN THE

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October Term, 1985

PREUIT & MAULDIN, a partnership;
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Petitioners

vs.

SAMUEL JONES, JR.,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' statement of the case is not entirely complete. Accordingly, the respondent is forced to provide his own statement of the case in order for the Court to fully understand the issue presently under consideration.

Respondent, Samuel Jones, Jr., a black citizen of the United States and the State of Alabama, commenced this action against the petitioners, Preuit & Mauldin, a partnership; E. F. Maul-

din, individually and as Executor of the estate of Leonard Preuit, deceased; and Preuit Mauldin, by filing a complaint in the United States District Court for the Northern District of Alabama on February 24, 1984. In his complaint, brought pursuant to the Civil Rights Act of 1871, 42 U.S.C. § 1983, respondent alleged that on or about April 8, 1982, the petitioners, acting under color of state law pursuant to Section 35-11-111 of the Alabama Code, 1975, obtained three writs of attachment for three International Harvester cotton pickers owned by respondent and caused the Sheriff of Lawrence County, Alabama to seize the three cotton pickers, thereby depriving respondent of the possession and use of his property. Respondent further alleged that the prejudgment seizure of his property without notice and a hearing did not comply with the due process requirements of the Fourteenth Amendment to the Constitution of the United States and that respondent was deprived of his rights, privileges and immunities secured by the Constitution and laws of the United States. Finally, respondent alleged in his complaint that as a proximate result of petitioners' unlawful actions, he not only was deprived of the possession and use of his property, but also incurred substantial expenses in harvesting his cotton crop and was deprived of income he otherwise would have received for harvesting cotton for others. Respondent sought $200,000 in compensatory damages, $200,000 in punitive damages, plus costs. Respondent also demanded a jury trial.

On March 12, 1984, petitioners filed a motion to dismiss on the grounds that the complaint failed to state a claim upon which relief could be granted and that respondent's claim was barred by the applicable statute of limitations. Thereafter, the district court granted petitioners' motion to dismiss on the ground that respondent's claim was barred by the statute of limitations. The court found that the "essential nature" of respondent's claim "is that he sustained damages as a proximate consequence of a denial of 'due process.'" (App. 18). Rejecting respondent's argument that the three-year statute of limitations contained in Section 6-6-148 of the Alabama Code, 1975,

relating to wrongful attachments, applied to the facts in this case, the court held that respondent's claim was barred by the "catch-all" statute of limitations contained in Section 6-2-39 (a) (5) of the Alabama Code, 1975, which at that time provided that "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section" must be commenced within one year. (App. 19-20). The court dismissed the action, and respondent appealed.[1]

The case was submitted for decision in the Eleventh Circuit on April 4, 1985, and on April 17, 1985, this Court rendered its decision in *Wilson v. Garcia,* 105 S.Ct. 1938 (1985). Recognizing this Court's holding in *Wilson* that "§ 1983 claims are best characterized as personal injury actions," and the Court's directive to "select, in each State, the one most appropriate statute of limitations for all § 1983 claims," 105 S.Ct. at 1947-49, the court below proceeded to determine which of two Alabama statute of limitations governing claims for recovery of damages for "personal injury" was the most appropriate statute to be applied to all § 1983 claims in Alabama. (App. 4-5).

The court noted that, because the § 1983 remedy encompasses a broad range of tort analogies, including those sounding in trespass and those sounding in trespass on the case, no one statute of limitations in Alabama governs all such claims.[2] For that reason, the court stated that "[t]he appropriate characterization of Section 1983 personal injury claims must be determined by searching the legislative history of the statute and

---

[1]After respondent's notice of appeal was filed, the Alabama Legislature repealed the one-year statute of limitations contained in Section 6-2-39 (a) (5), and extended the relevant limitations period to two years. *See* Act of Jan. 9, 1985, No. 85-39, 1984 Ala. Acts. Presently, "[a]ll actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section must be brought within *two* years." *Ala. Code* § 6-2-38 (1) (1985) (emphasis added). (App. 5).

[2]There are other statutes of limitations governing personal injury actions in Alabama, including the two-year limitations period governing wrongful death actions, *Ala. Code* § 6-2-38 (a) (1975), which has been held to be a personal injury action in Alabama. *Harris v. Elliott,* 277 Ala. 421, 171 So.2d 237 (1965).

isolating the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators intended first and foremost to address. The Supreme Court in *Wilson* made such a determination in order to conclude that Section 1983 claims are personal injury claims rather than general statutory claims falling within a catch-all limitations statute."[3] (App. 8-9). The court then analyzed the legislative history discussed by this Court in *Wilson,* concluding that "[t]he extensive legislative history demonstrates that members of the 42d Congress considered direct acts of violence against black citizens to be the paradigmatic wrong addressed by the new statute. Hence, the essential nature of a Section 1983 claim fits the description of trespass under Alabama law." (App. 10-11). The court held that "federal courts in Alabama will borrow the six-year limitations period as found in *Ala. Code* § 6-2-34 (1) (1975)," which governs "[a]ctions for any trespass to person or liberty." (App. 11). It followed that respondent's claim was timely; consequently the court reversed the judgment of the district court and remanded the case for further proceedings.[4] (App. 11).

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[3]The first sentence in the first full paragraph contained on page 7 of the Appendix, a portion of the Eleventh Circuit's opinion, reads as follows: "The characterization of Section 1983 claims given by the Supreme Court in *Wilson* resembles *an action in trespass on the case.*" That is a printing error. The Eleventh Circuit's opinion reads that "The characterization of Section 1983 claims given by the Supreme Court in *Wilson* resembles an action in *trespass rather than trespass on the case.*" *Jones v. Preuit & Mauldin,* 763 F.2d 1250, 1254 (11th Cir. 1985) (emphasis added).

[4]Petitioners did not assert any alternative basis in the court below for affirming the district court's dismissal of the case. (App. 11 n.5).

REASONS FOR DENYING THE WRIT

Petitioners have failed to present any "special and important reasons" for the issuance of a writ of certiorari. Sup. Ct. Rule 17. Contrary to the assertions in the petition, the decision by the court below is based on sound legal principles and is not in true conflict with any decision of another federal court of appeals or any decision of this Court. The decision below simply does not present any issue of substantial importance warranting consideration by the Court.

A. No True Conflict Exists Among The Circuits Regarding The Most Appropriate Statute Of Limitations To Apply To Section 1983 Claims.

Petitioners argue that the Court should issue a writ of certiorari because there is a conflict in the decisions of the Tenth and Eleventh Circuits regarding the most appropriate statute of limitations to apply to § 1983 claims. Petitioners' argument is totally without merit; there is simply no true conflict in this case.

In selecting the six-year statute of limitations contained in Section 6-2-34(1) of the Alabama Code, 1975, to apply to all § 1983 claims in Alabama, the court below did nothing more than carry out the task allotted to it by this Court in *Wilson v. Garcia*, 105 S.Ct. 1938 (1985); that is, "to select, in *each* State, the one *most appropriate* statute of limitations for all § 1983 claims" brought in that particular state. 105 S.Ct. at 1947 (emphasis added). In *Wilson*, after deciding that "§ 1983 claims are best characterized as personal injury actions," 105 S.Ct. at 1949, it was a relatively simple task under the New Mexico statutory scheme to select the appropriate statute of limitations. A *single* New Mexico statute of limitations applied to "injury to the person or reputation of any person." 105 S.Ct. at 1949, *quoting* N.M.Stat.Ann. § 37-1-8 (1978). The issue before the Eleventh Circuit was different. The issue it faced was: when two different limitations periods governing personal injury

claims are provided by a particular state's statutory scheme, which limitation period will govern a § 1983 action?

It should certainly come as no surprise to petitioners that some states have multiple statutes of limitations governing personal injury claims, while others have only one such statute. For example, in addition to Alabama, Colorado and Mississippi have at least two statutes of limitations governing personal injury actions, *McKay v. Hammock,* 730 F.2d 1367 (10th Cir. 1984) (*en banc*) (Colorado); *Gates v. Spinks,* 771 F.2d 916 (5th Cir. 1985) (Mississippi), while New Mexico, as mentioned above, has only one. *Garcia v. Wilson,* 731 F.2d 640 (10th Cir. 1984) (*en banc*) *aff'd, Wilson v. Garcia,* 105 S.Ct. 1938 (1985).

Furthermore, the diversity among the several states' limitations schemes is strikingly underscored by the fact that the various states having different limitations periods for personal injury sounding in trespass and personal injury sounding in case differ as to which of these is longer. Alabama allows six years for the former and one (two since January, 1985) for the latter, while Colorado and Mississippi provide the opposite, that is, only one year for trespass actions and six years for actions on the case.

What all this means, of course, is that the resulting period of limitations "most appropriate" to § 1983 claims will vary from state to state. As the Court recognized in *Burnett v. Grattan,* 104 S.Ct. 2924 (1984), the length of a limitations period will be influenced by a particular state legislature's determination of several factors, including "(1) the importance of the state claim at issue; (2) the need for repose for potential defendants; (3) considerations of judicial economy; and (4) the relationship of the limitations period to other state policy goals." 104 S.Ct. at 2931. Thus, the "uniformity" sought by petitioners is illusory because the actual operation of this Court's holding in *Wilson v. Garcia, supra,* will depend, in large part, upon the different statutory schemes of the various states. Indeed, the Tenth Circuit in *Garcia v. Wilson,*

supra, stated that "[t]he resulting period of limitations will vary from state to state, depending on state law." 731 F.2d at 651 n.4.

Petitioners also disregard the fact that in *McKay v. Hammock, supra*, the Tenth Circuit declared both personal injury limitations periods in Colorado inappropriate, and applied the three-year residuary statute. 730 F.2d at 1370. Thus, again, no one rule for the selection of state limitations periods can apply with equal force to all states because of the wide diversity in the various statutory schemes.

What, then, are the lower federal courts to do in this multiple-choice selection situation, if not exactly what the Eleventh Circuit did in this case: to select, given the peculiarities of the forum state's limitations scheme, the single most appropriate statute to apply to all § 1983 claims within that particular state. In light of this Court's holding in *Wilson v. Garcia* that the lower federal courts are "to select, in each State, the one most appropriate statute of limitations for all § 1983 claims," it is entirely to be expected, indeed it seems inevitable, that the lower courts will have some diversity of approach in selecting the single most appropriate statute in each state. The Court recognized as much in *Wilson v. Garcia*. Thus, the policy behind the preservation of uniformity in decision in the federal courts upon points of law solvable by federal law has no application in this case.

In *Wilson v. Garcia*, this Court defined the nature of the § 1983 remedy and enunciated the goals of that statute. The Court then allowed the lower federal courts to select, in each state, the limitations period that best furthers those ends. That is exactly what the court below did in this case. The court developed a consistent approach to the question left unanswered in *Wilson* that is easily applied and which has the desired effect of furthering the remedial goals of the Act. The decisions relied upon by petitioners as being in conflict with the decision of the court below are not actually in conflict, because they merely involve filling other gaps under other states' limitations schemes. The body of decisions in the lower courts seeking to

fill in the remaining gaps after *Wilson v. Garcia* is exactly what one would expect in light of the diversity of state limitations schemes, and there is nothing in *Wilson v. Garcia* that precludes the particular approach adopted by the Eleventh Circuit. In fact, the approach adopted by the Eleventh Circuit is entirely consistent with the principles enunciated in *Wilson v. Garcia,* as applied to Alabama's limitations scheme.[5] Accordingly, because there is no true conflict between the decision below and any decision of another federal court of appeals or this Court, the petition should be denied.

B. Because The Application Of The One-Year Statute To The Facts Of This Case Would Be Inconsistent With The Constitution And Laws Of The United States, The Eleventh Circuit Properly Disregarded That Statute.

A § 1983 suit affords redress for "a deprivation of a constitutional right" which "is more serious than a state tort." *Monroe v. Pape,* 365 U.S. 167, 196 (1961) (Harlan, J., concurring). Yet, the application of the one-year statute urged by petitioners would bar this more serious § 1983 suit, but a trespass suit, a suit on an attachment bond, or a common-law action for wrongful attachment, arising out of the same facts, would not be barred. As Justice Rehnquist recognized in his concurring opinion in *Burnett v. Grattan, supra,* "if the state statute of limitations discriminates against federal claims, such that a federal claim would be time-barred, while an equivalent state claim would not, then the state law is inconsistent with federal law." 104 S.Ct. at 2935. *See also Wilson v. Garcia,* 105 S.Ct. at 1947; *Campbell v. Haverhill,* 155 U.S. 610, 615-16 (1895). Accordingly, because application of the now repealed,

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[5]The decision by the court below is also consistent with the federal policy that, when there is a question as to which of two statutes of limitations to apply, the court should apply the longer of the two. *Gillette Dairy, Inc. v. Mallard Mnfg. Corp.,* 707 F.2d 351, 353 (8th Cir. 1983); *Marshall v. Kleppe,* 637 F.2d 1217, 1224 (9th Cir. 1980); *Reid v. Volkswagen of America, Inc.,* 512 F.2d 1294, 1297 (6th Cir. 1975); *Guam Scottish Rite Bodies v. Flores,* 486 F.2d 748, 750 (9th Cir. 1973).

one-year "catch-all" statute to the facts of this case would create an arbitrary result that is inconsistent with federal law, the court below properly disregarded that statute. For this additional reason, this case is not an appropriate one for the Court to exercise its certiorari jurisdiction. *See generally* Sup. Ct. Rule 22.1 (a brief in opposition may disclose "any matter or ground why the cause should not be reviewed by this Court").[6]

---

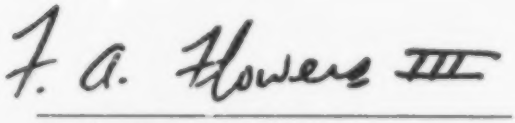
[6]The court below also could have held that the one-year "catch-all" statute repealed by the Alabama Legislature should not be applied in this case on the reasoning that, by repealing that statute, the Alabama Legislature made a value judgment that a one-year limitations period for personal injury claims is too short under present day conditions. *See generally Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463-64 (1975) ("the length of the period allowed for instituting suit inevitably reflects a 'value judgment' concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting prosecution of stale claims"). This reasoning does not involve a question of retrospective construction of a state statute, but rather a determination of the most appropriate limitation to borrow, which obviously should be the limitation that the present wisdom of the State has set, and not that of a past era, which the State now deems inappropriate to present societal conditions. Thus, if one assumes that a "catch-all" statute should be applied at all, and if the value judgment and wisdom of the Alabama Legislature is to be followed, this action is not barred because it was filed less than two years after respondent's claim arose.

CONCLUSION

In light of the foregoing, this case does not present any issue of substantial importance that merits consideration by the Court. The decision below is not in conflict with any decision of another federal court of appeals or any decision of this Court, and does not otherwise present any "special and important reason" for the issuance of a writ of certiorari. Accordingly, the petition should be denied.

Respectfully submitted,

C. V. Stelzenmuller



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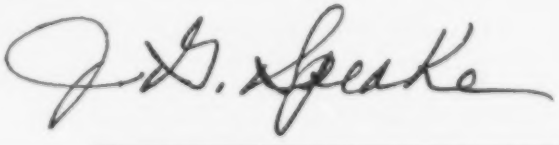

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PROOF OF SERVICE

I, C. V. Stelzenmuller, a member of the Bar of this Court, as counsel of record for respondent herein, Samuel Jones, Jr., hereby certify that three copies of the above and foregoing Brief in Opposition have been served by first-class United States mail, properly addressed and postage prepaid, upon T. Michael Putnam, Esq., Post Office Box 1760, Florence, Alabama 35631, on this 3rd day of December, 1985.

It is also certified that all parties required to be served have been served.

C. V. Stelzenmuller

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Sworn to and subscribed before me
this 3rd day of December, 1985.

Susan S. Turner

Notary Public

Supreme Court, U.S.
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No. 85-794

In The
Supreme Court of the United States
October Term, 1985

PREUIT & MAULDIN, a partnership;
and E. F. MAULDIN, individually and as Executor
of estate of Leonard Preuit, deceased;
and PREUIT MAULDIN,
Petitioners,

v.

SAMUEL JONES, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AS AMICUS CURIAE

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BRIEF FOR THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA AS AMICUS CURIAE

This brief is submitted on behalf of The Board of Trustees of The University of Alabama (The Board), as *amicus curiae,* with the written consent of all parties, given in letters which have been filed with the Clerk of this Court.

—o—

INTEREST OF THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ALABAMA

This case involves a decision of the United States Court of Appeals for the Eleventh Circuit holding that the appropriate state statute of limitations to be applied in actions under 42 U.S.C. Section 1983 is Alabama's six year statute of limitations for actions sounding in trespass.[1]

The Board is an incorporated institution of higher education with three campuses having a total enrollment of approximately 35,000; it also employs a total of approximately 14,000 persons. As such, The Board is confronted with numerous claims arising out of Section 1983. The basic issue posed by this case, however, is one of deepest concern, not only to The Board, but also to all potential litigants in Section 1983 actions. This question has implications extending far beyond the particular facts now presented to this Court. Accordingly, The Board desires to stress the importance of review by the Court in this case.

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1 *Ala. Code* § 6-2-34 (1975).

As cases decided since *Wilson v. Garcia*, — U.S. —, 105 S. Ct. 1938 (1985), have demonstrated, there is a need for further guidance from the Court with regard to its language "personal injury actions" as used in *Wilson*.[2] Where a state has but one personal injury statute of limitations, there would seem to be no problem of judicial interpretation[3]; however, where a state such as Alabama has more than one statute for personal injuries, there remains confusion as to which statute to apply, as more fully appears in the Petition for Writ of Certiorari herein.

For the foregoing reasons, The Board has a very real interest in the outcome of this case and respectfully requests that the Petition for Writ of Certiorari be granted.

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SUMMARY OF ARGUMENT

The United States Supreme Court, in *Wilson v. Garcia*, — U.S. —, 105 S. Ct. 1938 (1985), directed federal courts to choose the one personal injury statute of limitations to be applied to all actions under 42 U.S.C. Section 1983. This holding did not address the situation where a state has enacted more than one personal injury statute. Circuits have used differing reasoning and have reached different results when confronted with this situation. As a result, further guidance from the Court is needed.

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2 *Wilson v. Garcia*, — U.S. —, —, 105 S. Ct. 1938, 1949 (1985).

3 *But see Shorters v. City of Chicago*, — F. Supp. —, No 85-C-6078 (N.D. Ill. Sept. 6, 1985).

ARGUMENT

THERE REMAINS CONFUSION AMONG THE CIRCUITS REGARDING THE PROPER STATE STATUTE OF LIMITATIONS FOR SECTION 1983 ACTIONS AND THEREFORE THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI IN THE PROCEEDING AND ESTABLISH A UNIFORM STANDARD.

In *Wilson v. Garcia*, — U.S. —, 105 S. Ct. 1938 (1985), the Court was confronted with the issue of which state statute of limitations was appropriate in an action brought pursuant to 42 U.S.C. Section 1983. The Court's decision was made necessary by the numerous and varied approaches adopted by the Circuit Courts of Appeal. Expressing a desire for uniformity within each state and certainty in litigation, tht Court indicated that such claims "are best characterized as personal injury actions."[4] Federal courts were directed to select, in each state, one statute of limitations appropriate for all Section 1983 actions.[5] Left unaddressed was the situation where a state has enacted more than one personal injury statute of limitations. As a result, various federal courts have struggled to determine which statute should be chosen, in light of the Court's opinion in *Wilson*.

This conflict among the Circuits may be seen by examining the opinions of those courts. For instance, the Eleventh Circuit, in *Jones v. Preuit & Mauldin*, 763 F.2d 1250 (11th Cir. 1985), the case from which the present petition arose, held that Alabama's six year statute of lim-

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[4] *Wilson v. Garcia*, — U.S. —, 105 S. Ct. 1938, 1949 (1985).

[5] *Id.* at 1947.

itations applied.[6] Noting that the six year statute was applicable to actions sounding in trespass, as opposed to Alabama's one year statute of limitations for trespass on the case,[7] the Court opined that a Section 1983 claim "resembles an action in trespass rather than trespass on the case."[8]

Similar reasoning may be found in *Gates v. Spinks*, 771 F.2d 916 (5th Cir. 1985). In that case, the Fifth Circuit, relying largely on the Eleventh Circuit's opinion in *Jones*, held that Section 1983 actions were best characterized as actions in trespass for purposes of borrowing a state statute of limitations.[9] Thus, the Court chose Mississippi's one year statute [10] which included "[a]ll actions for assault, assault and battery, maiming, [and] false imprisonment."[11] The result in *Gates*, it should be noted, relegated all Section 1983 actions in Mississippi to a one year period in which to file suit.

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6 *Ala. Code* § 6-2-34 (1975) provides in pertinent part: "The following must be commenced within six years: (1) Actions for any trespass to person or liberty, such as false imprisonment or assault and battery; . . . ."

7 *Ala. Code* § 6-2-39(a)(5) (1975) provides: "The following must be commenced within one year: . . . (5) Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section; . . . ." This section was repealed effective January 9, 1985, by Acts of Alabama of 1984, 2d Exec. Sess., No. 85-39, § 3.

The current two year statute of limitations for negligent personal injury (trespass on the case) may now be found at *Ala. Code* § 6-2-38(1) (Supp. 1985).

8 *Jones v. Preuit & Mauldin*, 763 F.2d 1250, 1254 (11th Cir. 1985).

9 *Gates v. Spinks*, 771 F.2d 916, 919-20 (5th Cir. 1985).

10 *Miss. Code Ann.* § 15-1-35 (1972).

11 *Id.*

The Tenth Circuit, on the other hand, in the companion cases to *Garcia v. Wilson*, 731 F.2d 640 (10th Cir. 1984) (en banc), *aff'd*, — U.S. —, 105 S. Ct. 1938 (1985), has previously rejected the use of statutes aimed at intentional personal injuries. In *Hamilton v. City of Overland Park, Kansas*, 730 F.2d 613 (10th Cir. 1984) (en banc), *cert. denied*, — U.S. —, 105 S. Ct. 2111 (1985), the Kansas one year statute for "assault, battery, malicious prosecutions, or false imprisonment,"[12] was rejected. Instead, the Court chose to apply the Kansas two year statute for "[a]n action for injury to the right of another, not arising on contract, and not herein enumerated," found in *Kansas Statutes Annotated* Section 60-513(a) (4) (1976). Likewise, in *Mismash v. Murray City*, 730 F.2d 1366 (10th Cir. 1984) (en banc), *cert. denied*, — U.S. —, 105 S. Ct. 2111 (1985), the Court refused to apply Utah's one year statute of limitations for "libel, slander, assault, battery, false imprisonment or seduction."[13] Finally, in *McKay v. Hammock*, 730 F.2d 1367 (10th Cir. 1984) (en banc), the Court refused to find applicable Colorado's assault and battery and false imprisonment statute,[14] stating that Section 1983 actions involve more than "direct application of force."[15] Admittedly, the above cited cases were decided prior to the Court's decision in *Wilson*, but the Tenth Circuit's reasoning is nevertheless consistent with the holding in *Wilson*.

One final instance of confusion is *Shorters v. City of Chicago*, — F. Supp. —, No. 85-C-6078 (N.D. Ill. Sept. 6, 1985), where the district court refused to apply the Illinois

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12 *Kan. Stat. Ann.* § 60-514(2) (1976).

13 *Utah Code Ann.* § 78-12-29(4) (1953).

14 *Colo. Rev. Stat.* § 13-80-102 (1973).

15 *McKay v. Hammock*, 630 F.2d 1367, 1370 (10th Cir. 1984) (en banc).

statute of limitations for "injury to the person, or for false imprisonment or malicious prosecution."[16] The Court reasoned that Section 1983 actions encompassed a "far broader range of harms" than direct physical injury. State law, the court indicated, had construed the Illinois statute to apply only to direct physical injury.

The foregoing examples clearly indicate that further guidance from the Court is needed. It is but a matter of time before other circuits, attempting to apply *Wilson* in choosing the proper state personal injury statute of limitations, contribute to the confusion in this area. Only by addressing this question of paramount significance will the Court bring an end to the continuing uncertainty by indicating whether in states which have more than one personal injury statute of limitations, Section 1983 actions are best characterized as actions in trespass or as actions of trespass on the case.

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CONCLUSION

The question of which Alabama statute of limitations is appropriate for Section 1983 actions is one of profound importance to The Board, as well as to all parties in all states who may become litigants in Section 1983 actions. For the foregoing reasons, The Board respectfully requests this Court to grant the petition and allow full briefing of this important issue. If the petition in this case is granted, the Board will urge this Court to reverse the

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16 *Ill. Rev. Stat. ch. 110,* § 13-202.

decision of the Eleventh Circuit Court of Appeals in this case, which it feels is unsound as a matter of public policy.

Respectfully submitted,

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FILED
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(5)

No. 85-794

In The

Supreme Court of the United States

October Term, 1985

PREUIT & MAULDIN, a partnership; and E. F. MAULDIN, individually and as Executor of estate of Leonard Preuit, deceased; and PREUIT MAULDIN,

Petitioners,

v.

SAMUEL JONES, JR.

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF OF ALABAMA LEAGUE OF MUNICIPALITIES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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In The
SUPREME COURT OF THE UNITED STATES
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BRIEF OF ALABAMA LEAGUE OF MUNICIPALITIES AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CONSENT

This brief is filed with the written consent of all parties, such consent being on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Alabama League of Municipalities ("the League") is a voluntary association of cities and towns in the State of Alabama, with 401 of the approximately 435 municipalities in Alabama being members.

An issue of profound consequence for municipalities in Alabama (as well as all States) is presented by this case. The Eleventh Circuit Court of Appeals has held[1] that the statute of limitations to be applied in lawsuits under 42 U.S.C. §1983 is that governing common law "trespass" causes of action, which in Alabama is a 6-year statute of limitations.[2] This

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[1] Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. June 21, 1985).

[2] Ala. Code §6-2-34(a).

imposes a substantial hardship on municipalities, which elect officials every 4 years.[3/] Local governments would be required to defend cases with the infirmities of faded memories, lost records, and perhaps the death of witnesses, succeeding administrations would be required to defend cases arising before they were elected, and municipal budgets would be impacted by suits filed up to 6 years later.

SUMMARY OF ARGUMENT

This Court, in Wilson v. Garcia, 471 U.S. _____, 85 L.Ed.2d 254, 107 S.Ct. 1938 (1985), established the uniform rule that the State statute of limitations to be applied to §1983 is that governing "a general remedy for injuries to personal rights." But the

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[3/] Ala. Code §11-46-21(a).

printer's ink was barely dry on Wilson before the Eleventh Circuit eschewed the Alabama statute of limitations on a general remedy for injuries to personal rights[4] and instead applied the specialized trespass statute of limitations.[5] For this result, the Court purported to apply Wilson but in fact accorded it no more than a passing nod on its way to establishing its own view of the statutes of limitations which ought to be used in §1983 lawsuits.

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[4] Ala. Code §6-2-39(a)(5) [recodified in January 1985 as §6-2-38(1)] provides a 1-year [extended to 2 years in January 1985] statute of limitations for "actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."

[5] Ala. Code §6-2-34(1) and (2) provide 6-year statutes of limitations for "Actions for any trespass to person or liberty, such as false imprisonment or assault and battery" and "Actions for any trespass to real or personal property."

This departure from Wilson is seriously in error and deserves review by the Supreme Court before it attracts any more departures from Wilson.

ARGUMENT

I.

THE COURT OF APPEALS ENGAGED IN ITS OWN RE-ANALYSIS OF WILSON

Wilson cannot be read as any charter for the Courts to engage in their own analysis of the essential nature of §1983 cases for purposes of the statute of limitations. To entertain any such notion would be precisely at cross-currents with the fact that "It is beyond any dispute at all that Justice Stevens, speaking for the majority of the Court in Wilson v. Garcia, intended to bring some sense of national uniformity into the process of selecting

the appropriate statute of limitations for section 1983 actions ---." Winston v. Sanders, 610 F.Supp. 176, 177 (C.D. Ill. 1985).

Having expressed its intention to promote "uniformity, certainty, and the minimization of unnecessary litigation", Wilson then defined the essential nature of all §1983 claims for statute of limitations purpose and held that the standard is to be "a general remedy for injuries to personal rights" and "general personal injury actions, sounding in tort."

The Court thus established once and for all that the essential nature of §1983 cases for statute of limitations purposes is "a general remedy for injuries to personal rights." No longer would the various Courts engage in their own separate analysis of the "essential nature" of §1983 claims.

All that is required, as Wilson plainly envisioned, is for a Court to apply the statute of limitations governing "a general remedy for injuries to personal rights."

If Wilson had been followed here, all that need have been done was the simple task of turning to the Alabama statute of limitations governing "a general remedy for injuries to personal rights." Such statute of limitations is the then 1-year (now 2-year) period governing "Actions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section."

But that simple and straightforward route which this Court mapped out in Wilson was not followed by the Eleventh Circuit. Instead, it embarked on its own re-analysis of the essential nature

of §1983 cases and, having done so, arrived at a different destination.

This departure from the Wilson methodology is plainly revealed by the fact that after recognizing Wilson determines the essential nature of §1983 claims, the Eleventh Circuit almost immediately reverted to its own re-analysis of the essential nature subject, including the self-explanatory heading "Essential Nature of Section 1983 Personal Injury Claims." By the precise process which this Court would have thought were put to rest in Wilson, the Eleventh Circuit went on to determine the State cause of action which it considered the most analogous to §1983 cases.

This re-analysis of the point which this Court decided in Wilson is not only evident from the opinion itself

but as well has been recognized and even followed by another Court. In Small v. City of Belfast, 617 F.Supp. 1567 (D.Me. 1985), the Court aligned itself with the Eleventh Circuit and in doing so observed of the case sub judice that "the Jones court carefully analyzed the 'essential nature' of a section 1983 claim---." The fundamental flaw is that no Court should be engaging in its own re-analysis, careful or not, because that has been done by this Court in Wilson, and all that is appropriate is to follow this Court's decision.

This is further illustrated by the Eleventh Circuit's reliance on State common law pleading concepts. In Wilson, this Court's criticisms of the former procedure included the point that "Almost every §1983 claim can be

favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations." Yet in this case decided only two months later, the Eleventh Circuit relied on Alabama's common law pleading concepts of trespass and trespass on the case. To have done so is not only at odds with the essential nature definition established by Wilson but as well with the fact that this Court explicitly rejected such State law concepts, pointing out that "Congress intended the characterization of § 1983 to be measured by federal rather than state standards."

The sum of it is that the Eleventh Circuit, apparently dissatisfied with the "simple approach" chosen by this Court in Wilson, set out to re-think

the subject for the Court by engaging in its own re-analysis of the essential nature of §1983 cases. Review by this Court is important without more in order to conform the decision to the Wilson precedent.

II.

THE SELECTION OF THE TRESPASS ANALOGY IS CONTRARY TO WILSON

The Eleventh Circuit's selection of the trespass statute was contrary to Wilson for the following reasons:

First, this Court was explicit in Wilson in defining the statute of limitations to be applied uniformly in §1983 cases. It is not to be particularized categories of statutes of limitations. It is to be the statute of limitations governing "a general remedy for injuries to personal rights."

For emphasis, this Court twice spelled it out:

> "Had the 42d Congress expressly focused on the issue decided today, we believe it would have characterized §1983 as conferring a general remedy for injuries to personal rights." (Emphasis supplied).
>
> * * *
>
> "General personal injury actions, sounding in tort, constitute a major part of the total volume of civil litigation in the state courts today, and probably did so in 1871 when §1983 was enacted."

It can be rationally assumed that when this Court used the word "general", it meant "general". In Wilson, as here, the forum State provides a statute of limitations for general causes of action for injuries to the person or rights of another. It was applied in Wilson. In contrast, it was not applied here but was rejected in favor of a specialized trespass

statute. To have done so cannot be reconciled with Wilson.

Second, the trespass statute selected by the Eleventh Circuit is logically implausible. A trespass, by definition, requires an intentionally committed act. W. T. Ratliff Co. v. Henley, 405 So.2d 141 (Ala. 1981). But a "general remedy for injuries to personal rights" - the definition established in Wilson - most assuredly encompasses more than merely such injuries as are alleged to be caused intentionally.

Third, this Court in Wilson implicitly rejected exactly the result reached by the Eleventh Circuit in the present case. In describing the plaintiff's claims in Wilson, the Court observed that "This §1983 claim is arguably analogous to distinct state

tort claims for false arrest, assault and battery, or personal injuries." When the Court went on to hold that all §1983 claims are to be regarded as general remedies for personal injuries for statute of limitations purposes, it plainly rejected any notion that they ought to be treated as false arrest or assault and battery claims. Yet that is precisely the result reached by the Eleventh Circuit's re-analysis.

III.

THE COURT SHOULD RESOLVE THE GROWING DIVERSITY OF VIEWS REGARDING THE MEANING OF WILSON

Just in the brief period of time since Wilson, a diversity of opinion has developed among the Courts regarding the intended meaning of the case, as illustrated by a recent issue of a publication designed to alert lawyers

to current problems (if not the answers) carrying the message "Courts Still Confused Over Statute of Limitations in 'Civil Rights' Cases", with the text including the Eleventh Circuit's decision in the present case.[6/]

On the one hand, the Eleventh Circuit's decision in the case sub judice has led several courts to disdain the standard of "a general remedy for injuries to personal rights" encompassing all §1983 actions and instead to select specialized trespass, intentional act, or assault and battery analogies. Gates v. Spinks, 771 F.2d 916 (5th Cir. 1985); Cook v. City of Minneapolis, 617 F.Supp. 461 (D. Minn.

[6/]5 Lawyers Alert 33 (October 28, 1985).

1985); Small v. City of Belfast, 617 F.Supp. 1567 (D. Me. 1985).

On the other hand, the opposite and in our view correct application of Wilson was adopted in Shorters v. City of Chicago, 617 F.Supp. 661 (N.D. Ill. 1985). There, following an extensive analysis of Wilson, the Court held the general remedy statute of limitations, pointing to Wilson's use of phrases such as "general personal injury actions, sounding in tort." But faithful as it is to Wilson, it is confined only to one judicial district, and it stands alone against the weight of the Fifth and Eleventh Circuits having rejected general remedy statutes of limitations and having selected specialized trespass and assault and battery statutes of limitations, which

is nothing more than a re-structuring of the Wilson decision.

There is accordingly a compelling need, before any more diversity of views develop among the Courts, for this Court to accept review of the present case in order to avoid the continuation of a new round of confusion and uncertainty regarding the result which was intended by Wilson.

CONCLUSION

Given the far-reaching importance of the question, and the substantial negative impact of the Eleventh Circuit's decision on all public employers which now face potential claims up to 6 years old, we urge the Court to grant the petition for certiorari in order to review and

correct the growing deviation from Wilson.

Respectfully submitted,

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I hereby certify that the above and foregoing brief for Amicus Alabama League of Municipalities has been served by United States mail, postage prepaid, on:

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This the 4th day of December, 1985.

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No. 85-794

Supreme Court, U.S.
FILED
DEC 4 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1985

PREUIT & MAULDIN, a partnership; and E. F. MAULDIN, individually and as Executor of estate of Leonard Preuit, deceased; and PREUIT MAULDIN,

Petitioners,

v.

SAMUEL JONES, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF ASSOCIATED INDUSTRIES OF ALABAMA AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CONSENT

This brief is filed with the written consent of all parties, such consent being on file with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Associated Industries of Alabama ("AIA")[1] is a voluntary association consisting of approximately 2200 business organizations, ranging from those with 2 employees to those with nearly 30,000 employees.

The Eleventh Circuit's holding that §1983 lawsuits are to be treated under the 6-year trespass statute of limitations[2] is of concern to AIA because of the potential expansion of the holding to lawsuits under §1981. Virtually all lawsuits filed in the Federal Courts in Alabama alleging race discrimination in employment are tandem

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[1] By recent merger with the Alabama Chamber of Commerce, AIA is now known as The Business Council of Alabama.

[2] Jones v. Preuit & Mauldin, 763 F.2d 1250 (11th Cir. 1985).

Title VII-§1981 cases.[3/] If Preuit & Mauldin remains the law and is extended to §1981, the Title VII aspects of cases will be subject to the time limits embodied in such statute, while the §1981 aspects would be open for up to 6 years. Defendants would then be subjected to the substantial hardship of defending themselves against allegations concerning long-ago events.

THE DECISION BELOW

Illustrating that cases with far-reaching consequences may have humble origins, this case originated as a lawsuit alleging that issuance of writs of attachment without a hearing had resulted in the attachment of cotton pickers allegedly in violation of due

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[3/] Title VII of the Civil Rights Act of 1964, as amended in 1972. 42 U.S.C. §2000e et seq.

process rights. The then 1-year (now 2-year) statute of limitations for actions for any injury to the person or rights of another[4] was applied by the District Court in accordance with the then settled application of such statute to §1983 and §1981 lawsuits. The Eleventh Circuit reversed, holding that the statute of limitations to be applied to §1983 actions is the 6-year period governing trespass actions.[5]

Neither in the District Court nor in the Court of Appeals did anyone argue for application of the 6-year trespass statute. Instead, the plaintiff argued for application of a 3-year statute governing actions on attachment bonds. That argument was rejected

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[4] Ala. Code §6-2-39(a)(5), recodified as §6-2-38(1) in January 1985 when extended to 2 years.

[5] Ala. Code §6-2-34.

by the District Court and was not commented on by the Court of Appeals. The selection of the 6-year trespass statute of limitations was accordingly the product of the Court of Appeals alone.[6/]

[6/]The Court was entitled to decide the case on a ground not briefed or argued, but it is equally true that:

> "The basic premise of common-law jurisprudence is the view that the best and surest way of ascertaining the truth and arriving at a just result is to have an impartial tribunal make its decision after first hearing the opposing parties present their conflicting contentions in the strongest and most forceful way.
>
> "The corollary of that premise is that where the opposing positions are not strongly or argumentatively presented, the tribunal may well fail to ascertain the truth and reach a sound result, and may be led into egregious error." Wiener, Briefing and Arguing Federal Appeals, pp. 12-13 (1961).

SUMMARY OF ARGUMENT

In holding that the statute of limitations for §1983 cases is the 6-year Alabama trespass statute, and not the 1-year (now 2-year) statute governing general remedies for injuries to the person or rights of another, the Eleventh Circuit not only departed from the Supreme Court's teaching only two months earlier in the Wilson case[2/] but further set the stage for application of the 6-year trespass statute of limitations to §1981. The practical result would be that the statute of limitations will have been expanded from 1 year to 2 years by legislative amendment in January 1985 and then to 6 years by the Eleventh Circuit in June 1985.

[2/] Wilson v. Garcia, 471 U.S. ___, 85 L.Ed.2d 254, 107 S.Ct. 1938 (1985).

The 6-year statute of limitations is in direct contravention of the Federal labor policy of swift resolution of employment disputes. That policy is evidenced both by the time limits provided in Title VII of the 1964 Civil Rights Act and by the holdings of this Court on the statute of limitations for Federal labor laws when Congress chose to not include a statute of limitations.

ARGUMENT

A. THE PRESENT 2-YEAR STATUTE OF LIMITATIONS:

Lawsuits based on §1981 have consistently been subject to the statute of limitations governing general remedies for "any injury to the person or rights of another not arising from

contract and not specifically enumerated in this section."[8] Until January 1985, this limitations period was 1 year, which was extended by the Alabama Legislature in January 1985 to 2 years.[9]

There has never been any deviation from the application of this injury to the person or rights of another statute of limitations for §1981 cases since it was established as the applicable statute for §1981 in the early 1970's.[10]

Similarly, employment cases against public employers typically come to the courthouse based on the triad of

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[8] Ala. Code §6-2-39(a)(5), recodified as Ala. Code §6-2-38(1).

[9] Acts of Alabama of 1984, 2nd Exec. Sess., No. 85-30, Section 3, effective January 9, 1985.

[10] Buckner v. Goodyear Tire & Rubber Co., 339 F.Supp. 1108 (N.D. Ala. 1972), aff'd, 476 F.2d 1287 (5th Cir. 1973).

§1981, §1983, and Title VII, and consistency has existed by reason of the same statute of limitations on actions for any injury to the person or rights of another being applied to §1981 and §1983 alike.[11/]

This statute of limitations was expanded from 1 year to 2 years by the State Legislature in January 1985. Then in June 1985, the Eleventh Circuit rejected this statute for §1983 and instead selected the 6-year trespass statute.

A difference of opinion has already surfaced within the one Court which thusfar has considered whether the Supreme Court decision in Wilson means the same statute of limitations must be

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[11/] E.g., Dumas v. Town of Mount Vernon, 612 F.2d 974 (5th Cir. 1980); Williams v. City of Montgomery, 550 F.Supp. 662 (M.D. Ala. 1982), aff'd, 742 F.2d 586 (11th Cir. 1984), cert. denied, 105 S.Ct. 1756 (1985).

used for both §1981 and §1983. In Goodman v. Lukens Steel Co., 54 U.S.L.W. 2271 (3rd Cir. 1985), the majority opinion held that Wilson is to be interpreted as requiring application of the same statute of limitations for §1981 as is used for §1983, while the dissent argued that nothing in Wilson compels such a result. That debate will continue until resolved by the Supreme Court.[12/]

In the meantime, assuming extension of the Preuit & Mauldin precedent to §1981, defendants face the prospect of the §1981 statute of limitations having been extended from 1 year to 2 years in

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[12/] Both Courts and counsel would doubtless be grateful to have this Court provide guidance on the §1981-§1983 question as soon as possible, such as on review of the case sub judice.

January 1985 and again extended to 6 years in June 1985 by the Eleventh Circuit. The result is that defendants will be subjected to employment lawsuits concerning occurrences alleged to have taken place up to 6 years in the past.

B. THE ELEVENTH CIRCUIT DECISION IS CONTRARY TO THE POLICY OF SPEEDY RESOLUTION OF EMPLOYMENT CASES:

The principle that Federal Courts borrow the statute of limitations of the forum State when Congress has not provided a limitations period is subject to the premise that "A state law is not 'appropriate' if it fails to take into account practicalities that are involved in litigating federal civil rights claims and policies that are analogous to the goals of the Civil

Rights Act."[13/]

The reasons that the Eleventh Circuit's selection of the 6-year trespass statute is not appropriate include the conflict of this ruling with the policy of speedy resolution of employment disputes. This policy has been firmly established both by the time limits enacted by Congress and by judicial interpretations of laws for which Congress has not enacted a time limit.

1. Time limits enacted by Congress: In all of the Federal employment statutes for which Congress has provided time limits, the goal of

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[13/] Burnett v. Grattan, 468 U.S. ___, 104 S.Ct. 2930, 82 L.Ed.2d 36 (1984). See also Johnson v. Railway Express Agency, 421 U.S. 454, 465 (1974) ("considerations of state law may be displaced where their application would be inconsistent with the federal policy underlying the cause of action under consideration.").

speedy resolution is evident.

For example, this Court said with reference to Title VII in Mohasco Corp. v. Silver, 447 U.S. 807 (1980) that:

> "By choosing what are obviously quite short deadlines, Congress clearly intended to encourage the prompt processing of all charges of employment discrimination---."

Similarly, the Congressional desire for prompt resolution of employment cases is illustrated in such Federal statutes as the Age Discrimination in Employment Act and the National Labor Relations Act.[14/]

[14/] 29 U.S.C. § 626(d) (Age Discrimination in Employment Act gives 180 days for complaining party to file a charge with the Equal Employment Opportunity Commission); 29 U.S.C. § 160(b) (National Labor Relations Act provides a 6 months time limit); 5 U.S.C. § 7118(a)(4)(A) (complaint to Federal Labor Relations Authority about an unfair labor practice must be within six months); 5 C.F.R. §§ 1201.22(b), 1201.154(a)(1) (Appeals to the Merit Systems Protection Board over an agency action must be filed within 20 days); 29 U.S.C. § 255(a) (Equal Pay Act has a 2 or 3 year statute of limitations).

2. Judicial interpretations of statutes without a statute of limitations: This Court, when considering the choice of statutes of limitations for Federal employment cases for which Congress has not enacted a time limit, has repeatedly favored and adopted the statute of limitations which effectuates the policy of swift resolution of employment claims.

For instance, in Del Costello v. International Brotherood of Teamsters, 462 U.S. 151 (1983), the Court held that the 6 month time limit provided by the National Labor Relations Act,[15] should be the applicable statute of limitations on claims against the Employer under the Labor Management Relations Act and the Union on the fair representation duty theory. In so holding, the Court stated:

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[15] 29 U.S.C. §160(b).

> "[W]hile application of a short arbitration period as against employers would endanger employees' ability to recover most of what is due them, application of a longer malpractice statute as against unions would preclude the relatively rapid final resolution of labor disputes favored by federal law."

3. Goals served by the rapid resolution of employment cases: The Courts have emphasized the goals served by the rapid resolution of employment cases. In Delaware State College v. Ricks, 449 U.S. 250 (1980), where the plaintiff sued under §1981 and Title VII, the Court pointed out that:

> "The limitations periods, while guaranteeing the protection of the civil rights laws to those who promptly assert their rights, also protect employers from the burden of defending claims arising from employment decisions that are long past."

Similarly, the reasons for the rapid disposition of employment cases was recently explained in Smith v. City of Chicago, 769 F.2d 408 (7th Cir.

1985). In that case, the Court pointed to the Supreme Court's instruction that "reasonably short periods should be borrowed in employment cases"[16] and explained that:

> "Litigation about hiring, firing, and the assignment of work has more urgency about it. If a person is fired, someone else is likely to be given the work. Litigation may require the employer to pay twice for the same work, as the Supreme Court emphasized in Arant, supra, 249 U.S. at 372, 39 S.Ct. at 294. If the litigation also produces an order to reinstate a wronged employee, or to hire a wronged applicant for work, this may cause loss to other innocent employees. See Franks v. Bowman Transportation Co., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed. 2d 444 (1976); International Brotherhood of Teamsters v. United States, 431

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[16] As the Court said:

> "United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981), and DelCostello hold that reasonably short periods should be borrowed in employment cases and reject arguments for use of the statute of limitations for enforcing contracts. The reasons the Court gives in Mitchell and DelCostello apply here as well."

> U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Disputes of this sort should be filed quickly and litigated briskly in order to hold to a minimum unnecessary loss to employer and other employees--loss that ultimately must lead to lower wages for all employees."

The loss of speed and economy from a long 6-year statute of limitations is obvious. Employment grievances that are not even filed for 6 years are bound to create industrial unrest and the unreliability of evidence clouded by faded memories, personnel changes, and death. That cannot be reconciled with this Court's observation in Wilson that "Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."

Furthermore, the decision below is virtually certain to produce an

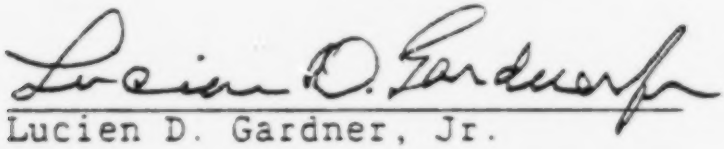
increase in case-filings as persons whose claims were barred now attempt to revive them by reliance on the expansion of the statute of limitations to 6 years under the Eleventh Circuit's decision. It has recently been held that "the interests of section 1983 are best served by a retroactive application of Wilson to extend the statute of limitations time period." Rivera v. Green, ___ F.2d _____ (9th Cir. 1985). Assuming continued acceptance of this retroactivity view, there is every reason to expect that the Federal Courts in Alabama (and elsewhe e) will be receiving lawsuits on matters which had been considered disposed of by repose long ago.

CONCLUSION

It is respectfully submitted that the decision of the Court of

Appeals for the Eleventh Circuit will have a significant adverse impact on employers both in Alabama and in all States with similar trespass statutes of limitations, that it is contrary to the Federal labor policy of speedy resolution of employment cases, and that the Court should grant the Petition for a Writ of Certiorari and correct the error by the Eleventh Circuit.

Respectfully submitted,



Lucien D. Gardner, Jr.

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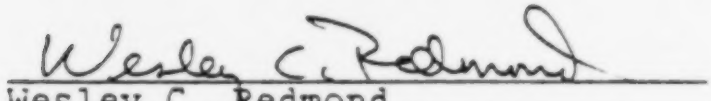

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This the 4th day of December, 1985.

Lucian O. Gardner

SUPREME COURT OF THE UNITED STATES

PREUIT & MAULDIN ET AL. *v.* SAMUEL JONES, JR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85–794. Decided January 27, 1986

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

In *Wilson* v. *Garcia*, —— U. S. —— (1985), we held that an action under 42 U. S. C. § 1983 should be considered a personal injury action for purposes of borrowing an appropriate state statute of limitations. The present case presents the question of what to do when more than one state statute of limitations applies to personal injury actions.

The respondent in this case is an Alabama farmer who brought a § 1983 action against petitioners for allegedly violating his Fourteenth Amendment due process rights by causing his equipment to be seized pursuant to prejudgment attachment writs that petitioners obtained without notice or a hearing. The only significant issue on appeal was the appropriate statute of limitations to borrow from the Alabama Code. 763 F. 2d 1250 (CA11 1985). The Eleventh Circuit explained that its task of applying *Wilson* v. *Garcia*, *supra*, was complicated by the fact that Alabama has not one but two personal injury statutes of limitations. Alabama Code § 6–2–34(1) governs actions for "any trespass to person or liberty, such as false imprisonment or assault and battery," and has been interpreted by the Alabama courts as applying to actions for trespass. Ala. Code § 6–2–39(a)(5) governs "[a]ctions for any injury to the person or rights of another not arising from contract and not specifically enumerated in this section," and has been interpreted by the Alabama courts as applying to actions for trespass on the case. The Eleventh Circuit resolved its seeming dilemma in applying *Wilson* v.

Garcia by reasoning that while not all § 1983 actions involve trespass, trespass is "the particular type of wrong that was most paradigmatic, the one category of wrongs that the legislators [who enacted § 1983] intended first and foremost to address." 763 F. 2d, at 1255. Accordingly, the court held that the six-year statute of limitations provided by § 6–2–34(1), rather than the then one-year statute of limitations provided by § 6–2–39(a)(5), should govern § 1983 actions in Alabama.[1]

The Eleventh Circuit's decision in this case conflicts with three *en banc* decisions by the United States Court of Appeals for the Tenth Circuit, all of which were companion cases to the decision we affirmed in *Wilson* v. *Garcia*, *supra*. In *Hamilton* v. *City of Overland Park, Kansas*, 730 F. 2d 613 (CA10 1984) (*en banc*), cert. denied, —— U. S. —— (1985), the Tenth Circuit rejected, for § 1983 purposes, use of the one-year Kansas statute of limitations governing "[a]n action for assault, battery, malicious prosecution, or false imprisonment," and instead chose the two-year limitations period for "[a]n action for injury to the rights of another, not arising on a contract, and not herein enumerated." In *Mismah* v. *Murray City*, 730 F. 2d 1366 (CA10 1984) (*en banc*), cert. denied, —— U. S. —— (1985), the Tenth Circuit similarly rejected use of the one-year Utah statute of limitations governing "[a]n action for libel, slander, assault, battery, false imprisonment, or seduction," and, in the absence of an express Utah statute of limitations governing actions for injury to the rights of another, opted for the four-year limitations period for "[a]n action for relief not otherwise provided by law." Finally, in *McKay* v. *Hammock*, 730 F. 2d 1367 (CA10 1984) (*en banc*), a case in which certiorari was not sought, the Tenth Circuit noted that Colorado had distinct statutes of limitations for actions for trespass (one year) and trespass on the case (six years), and, finding the distinc-

[1] Section 6–2–39(a)(5) now provides a two-year statute of limitations, pursuant to an amendment enacted in January 1985.

tion between trespass and case irrelevant to § 1983, opted instead to use the residuary three-year period for "[a]ll other actions of every kind for which no other period of limitation is provided by law."

As the foregoing cases demonstrate, the Tenth Circuit finds it inappropriate to borrow for § 1983 purposes a statute of limitations governing common-law trespasses, preferring instead to look for a statute more compatible with its characterization of a § 1983 action as "in essence an action for injury to personal rights." *Garcia* v. *Wilson*, 731 F. 2d 640, 651 (1984), affirmed, —— U. S. ——. The conflict between the Tenth and Eleventh circuits is evidenced with particular clarity in *Hamilton*, *supra*, where the statutes of limitations chosen and rejected are virtual mirror images of the statutes of limitations chosen and rejected in this case.

The conflict regarding the appropriate criteria for chosing a statute of limitations for § 1983 actions is not limited to the the Tenth and Eleventh Circuits. In *Gates* v. *Spinks*, 771 F. 2d 916 (CA5 1985), the Fifth Circuit, expressly following the Eleventh Circuit's decision in this case, rejected a six-year Mississippi residuary statute of limitations which governs negligence and strict liability personal injury actions in that state, and instead decided that § 1983 cases should be governed by the one-year limitations period governing "most, if not all, common-law intentional torts." *Id.*, at 919. *Gates* v. *Spinks* is worth noting, not only because it is clearly inconsistent with the Tenth Circuit's decision in *Mismah* v. *Murray City*, *supra*, but also because it highlights an effect of following the Eleventh Circuit's decision in this case which is not obvious from the present decision: The § 1983 statute of limitations will as a rule be shorter if based on a statute of limitations governing intentional torts than it would if based on a more general statute of limitations governing other personal injury actions.[2]

[2] The following is a sampling, which does not purport to be exhaustive, of statutes of limitations akin to those at issue in the present case. For

It will not do to argue, as respondent does in his Brief in Opposition to Certiorari, that no conflict is possible because each state statutory scheme is *sui generis*. *Id.*, at 5–8. It is conflicting principles, not variations in state statutory schemes, that have determined the statutes of limitations chosen for § 1983 actions in the Tenth Circuit on the one hand and the Fifth and Eleventh Circuits on the other.

The conflict between the circuits presented by this case is not likely to disappear without guidance from this Court.[3] While the Tenth Circuit's characterization of a § 1983 action as one for injury to personal rights is arguably somewhat different from the personal injury characterization we adopted in *Wilson* v. *Garcia*, *supra*, it seems doubtful that the Tenth Circuit will soon overrule its *en banc* decisions in *Hamilton*, *supra*, and *Mismah*, *supra*, in view of the fact that we denied certiorari in those cases after *Wilson* v. *Garcia* was decided. Had we considered those decisions inconsistent with *Wilson*, our normal course would have been to grant certiorari in order to vacate the decisions below and remand for reconsideration in light of *Wilson*. Since we did not see fit to call for the Tenth Circuit to reconsider those decisions, it is predictable that it will adhere to them, notwithstanding the conflicting decisions by the Eleventh and Fifth Circuits.

It is clear to me that the Court should provide further guidance to the lower courts on the issue here presented, and I

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each state, the first, longer statute of limitations governs actions described in language virtually identical to Ala. Code § 6–2–38(a)(5), and the second, shorter statute of limitations governs all of the following intentional torts: libel, slander, assault, battery, and false imprisonment. Minn. Stat. §§ 541.05 (6 years), 541.07 (2 years); Mo. Rev. Stat. §§ 516.120 (5 years), 516.140 (2 years); N. C. Gen. Stat. §§ 1–52(5) (3 years), 1–54(3) (1 year); Okla. Stat. Tit. 12, §§ 95(Third) (2 years), 95(Fourth) (1 year); S. C. Code §§ 15–3–530(5) (6 years), 15–3–550(1) (2 years).

[3] Uniformity could also be achieved, of course, by Congressional enactment of a uniform period of limitations for § 1983 actions. That course has much to commend it, but it is unacceptable, in my view, to delay resolving a conflict among the circuits in the hopes that Congress will intervene.

see no benefit in delaying its resolution. While I understand the Court's reluctance to return so quickly to the issue that we had hoped to lay to rest in *Wilson* v. *Garcia*, *supra*, I must respectfully dissent.